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**UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION**

CENTER FOR BIOLOGICAL DIVERSITY *et al.*,

Plaintiffs,

V.

SCOTT PRUITT, in his official capacity as  
the Administrator of the United States  
Environmental Protection Agency,

Defendant.

) Case No. 3:17-cv-03239-MMC  
)  
) **PLAINTIFFS' NOTICE OF MOTION,**  
) **MOTION FOR SUMMARY**  
) **JUDGMENT & MEMORANDUM**  
) **OF POINTS AND AUTHORITIES**  
) **THEREOF, AND [PROPOSED]**  
) **ORDER**

) Date: February 2, 2018  
) Time: 9:00 am  
) Courtroom: 7  
) Judge: Hon. Maxine M. Chesney

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**GLOSSARY**

CAA	Clean Air Act
CTG	Control Technology Guidelines
EPA	United States Environmental Protection Agency
FIP	Federal Implementation Plan
NAAQS	National Ambient Air Quality Standard
NOx	Nitrogen Oxides
NSR	New Source Review
PPM	Parts Per Million
RACT	Reasonably Available Control Technology
RFP	Reasonable Further Progress
SIP	State Implementation Plan
VOC	Volatile Organic Compound

**NOTICE OF MOTION**

Please take notice that on February 2, 2018 at 9:00 a.m. or as soon thereafter as counsel can be heard, Plaintiffs Center for Biological Diversity and Center for Environmental Health [hereinafter “Centers”] will move, pursuant to Fed. R. Civ. P. 56(c), this Court to grant summary judgment on Claim One of Plaintiffs’ First Amended Complaint for Injunctive and Declaratory Relief (Dk.#24), except for the portions of Claim One pertaining to Sheboygan County, WI nonattainment area and the Denver-Boulder-Greeley-Ft. Collins-Loveland (“Metro-Denver”) area, which Plaintiffs now consider moot for the purposes of this case.

**RELIEF REQUESTED**

The Centers seeks an order with declaratory relief that Defendant Scott Pruitt, in his official capacity as Administrator of the United States Environmental Protection Agency (hereinafter “EPA”), violated his mandatory duties and requiring EPA to:

1) For each nonattainment area identified on the table below, sign a notice making a finding of failure to submit the nonattainment State Implementation Plan (SIP) elements for the 2008 ozone NAAQS identified on the table (and required by 42 U.S.C. §§ 7511a(a), 7511a(b); and 7502(c)(9)) by no later than 90 days after the Court issues an order on Plaintiffs’ motion for summary judgment;

AREA	ELEMENTS
Chicago-Naperville (Illinois portion)	Contingency measures for volatile organic compounds (VOC) and nitrogen oxides (NOx); Inspection and Maintenance (I/M) basic; nonattainment new source review (NSR) moderate; ozone attainment demonstration; Reasonable Available Control Technology (RACT) Non-Control Technique Guidelines (CTG VOC for major sources; RACT

	NOx for major sources; Reasonable Further Progress VOC and NOx – Moderate.
Chicago-Naperville (Wisconsin portion)	Nonattainment NSR Moderate.
Imperial County, CA	Contingency measures for VOC and NOx; Emission Statement; I/M Basic; RACT Non-CTG VOC for major sources; RACT NOx for major sources; Ozone Attainment Demonstration; RFP VOC and NOx – Moderate.
Kern County (Eastern Kern), CA	Contingency measures for VOC and NOx; Emission Statement; I/M Basic; Nonattainment NSR moderate; RACT NOx for major sources; Ozone Attainment Demonstration; RFP VOC and NOx – Moderate.
Mariposa County, CA	Emission Statements; Nonattainment NSR – Moderate.
Nevada County (Western part), CA	Contingency measures for VOC and NOx; Emission Statement; I/M Basic; RACT Non-CTG VOC for major sources; Ozone Attainment Demonstration; RFP VOC and NOx – Moderate.
New York-N. New Jersey-Long Island (New York portion)	Contingency measures for VOC and NOx; RACT Non-CTG VOC for major sources; RACT NOx for major sources; Ozone Attainment Demonstration; RFP VOC and NOx – Moderate.
New York-N. New Jersey-Long Island (New Jersey portion)	Contingency measures for VOC and NOx; RACT Non-CTG VOC for major sources; RACT NOx for major sources; Ozone Attainment Demonstration; RFP VOC and NOx – Moderate.

2) Within three working days of signature, forward the signed notices required by paragraph 1 above to the Office of the Federal Register for review and publication.

**POINTS AND AUTHORITIES IN SUPPORT OF THE MOTION**

**I. ISSUES TO BE DECIDED**

The only issue to be decided in this case is the amount of time the Court should grant EPA to comply with the mandatory duties outlined above. *See* Joint Case Management Statement (Dkt. No. 28) at 8.<sup>1</sup>

**II. FACTS**

**A. OZONE POLLUTION AND ITS ADVERSE IMPACTS**

While ozone is critical for the protection of the Earth when it is in the stratosphere, at ground level, ozone, the chief component of smog, is a dangerous air pollutant which causes a variety of adverse impacts. According to EPA, based on exhaustive scientific review, exposure to ozone pollution can decrease lung function, increase respiratory symptoms, and, over time, lead to chronic effects such as chronic bronchitis or long-term lung damage that can lead to reduced quality of life and even death. 73 Fed. Reg. 16,436, 16,450-16,451 (Mar. 27, 2008). Ozone pollution also is associated with aggravation of asthma, increased medication use, increased school and work absences, increased susceptibility to respiratory infection, increased visits to doctors' offices and emergency departments, and increased admissions to hospitals. *Id.* Those most at risk from ozone pollution are children, active people (*e.g.*, runners and people

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<sup>1</sup> In the Joint Case Management Statement, Defendant noted that the State of Colorado has represented to the public that it has yet to adopt RACT for major sources. Joint Case Management Statement (Dkt. No. 28) at 2-4. However, Plaintiffs have now concluded, solely for the purposes of this case, that the portion of Claim One alleging that EPA must make a finding of failure to submit for the Metro-Denver area is moot.



1 who do manual labor outside), people with pre-existing lung and heart diseases such as asthma,  
2 and older people. *Id.* at 16,440.

3 Ozone also damages vegetation, including both native and commercial crops. *Id.* at  
4 16,485-16,486. Observed ozone impacts on vegetation include reduced tree growth, seedling  
5 and mature tree biomass loss, reductions in crop yields, visible foliar injury, and reduced plant  
6 vigor. *Id.* at 16,486, 16,488. Studies reveal that important tree species such as quaking aspen,  
7 ponderosa pine, black cherry, and tulip poplar experience biomass loss due to ozone exposure.  
8 *Id.* Likewise, studies indicate that ozone pollution causes reduced growth in species such as  
9 Ponderosa pine in the San Bernardino Mountains of California, and yellow poplar and red maple  
10 in the Appalachian Mountains of Virginia and North Carolina. *Id.* EPA explains that “Ponderosa  
11 pine is one of the most widely distributed pines in western North America, a major source of  
12 timber, important as wildlife habitat, and valued for aesthetics. *Id.* Likewise, “Red maple is one  
13 of the most abundant species in the eastern U.S. and is important for its brilliant fall foliage and  
14 highly desirable wildlife browse food.” *Id.* More broadly, damage to native vegetation results in  
15 ecosystem damage, including diminished ecosystem services, that is, the life-sustaining services  
16 that ecosystems provide to people for free, such as clean air, clean water and carbon  
17 sequestration. *Id.*

18 **B. EPA’S 2008 OZONE STANDARD AND EPA’S OBLIGATION TO MAKE**  
19 **A FINDING OF FAILURE TO SUBMIT FOR STATES THAT DID NOT**  
20 **SUBMIT REQUIRED PLAN ELEMENTS BY THE DUE DATE.**

21 Section 109 of the Clean Air Act, 42 U.S.C. § 7409, requires that EPA issue primary and  
22 secondary national ambient air quality standards (NAAQS) for “criteria” air pollutants, which  
23 now include ozone, particulate matter, carbon monoxide, sulfur dioxide, nitrogen dioxide, and  
lead. 40 C.F.R. part 52. The primary standard must be set at the level requisite to protect public

1 health, including an adequate margin of safety. 42 U.S.C. § 7409(b)(1). The secondary standard  
2 must be set at the level requisite to protect public welfare from any known or anticipated adverse  
3 effects, including effects on vegetation, crops, soils, water, wildlife, visibility, and climate,  
4 among others. 42 U.S.C. §§ 7409(b)(2), 7602(h). The Clean Air Act requires that EPA review  
5 the NAAQS at 5-year intervals and make revisions (or promulgate new NAAQS) as needed to  
6 protect public health and welfare. 42 U.S.C. § 7409(d).

7 After EPA sets a new NAAQS or revises an existing standard, the Clean Air Act requires  
8 EPA to determine if areas of the country meet the new standards. 42 U.S.C. § 7407(d). Based on  
9 state recommendations and data from air quality monitors, and/or models, EPA designates each  
10 area as attainment or nonattainment for the standard. *Id.* An area with air quality that meets or  
11 exceeds the national standard is called an “attainment area,” whereas an area that does not meet  
12 the standard is called a “nonattainment area.” *Id.* After EPA makes these designations, states  
13 must develop state implementation plans (SIPs) that outline how areas will attain and maintain  
14 the national standard by reducing air pollutant emissions. 42 U.S.C. § 7410.

15 In 2008, EPA strengthened the primary and secondary ozone NAAQS from 0.08 to 0.075  
16 parts per million (ppm). 73 Fed. Reg. at 16,436. EPA made attainment and nonattainment  
17 designations for the 2008 ozone NAAQS effective July 20, 2012. *See* 77 Fed. Reg. 30,088 (May  
18 21, 2012), 77 Fed. Reg. 34,221 (June 11, 2012). EPA designated all of the areas listed in on  
19 Table 1 below as nonattainment. *Id.* All of the elements of the nonattainment SIPs for the 2008  
20 ozone NAAQS listed in Table 1 were due by no later than January 1, 2017. *See* 81 Fed. Reg.  
21 26,697 (May 4, 2016); 80 Fed. Reg. 12,264, 12,266 (Mar. 6, 2015). *See also*  
22 [https://www3.epa.gov/airquality/urbanair/sipstatus/reports/ozone-](https://www3.epa.gov/airquality/urbanair/sipstatus/reports/ozone-8hr_2008_elembynaqs.html#ozone-8hr_2008_1397)  
23 [8hr\\_2008\\_elembynaqs.html#ozone-8hr\\_2008\\_1397](https://www3.epa.gov/airquality/urbanair/sipstatus/reports/ozone-8hr_2008_elembynaqs.html#ozone-8hr_2008_1397).

Clean Air Act Section 110(k), 42 U.S.C. § 7410(k), sets forth the process by which EPA reviews SIP submissions and revisions. If a State fails to submit a SIP or SIP revisions, EPA has a mandatory duty to make a “finding of a failure to submit” within six months after the due date. *Id.* § 7410(k)(1)(B). Joint Case Management Statement (Dkt. No. 28) at 7. Thus, for states with affected ozone nonattainment areas that did not submit all of the required elements of their nonattainment SIPs, EPA has a mandatory duty to make a finding of failure to submit by no later than six months after the deadline for state SIP submittals, that is July 1, 2017. 42 U.S.C. § 7410(k)(1)(B). EPA admits (in Def.’s Answer, ¶ 33, Dkt. No. 28) that states have not submitted nonattainment SIPs containing the following elements for the 2008 ozone NAAQS for the following nonattainment areas:

**TABLE 1**

<b>AREA</b>	<b>ELEMENTS</b>
Chicago-Naperville (Illinois portion)	Contingency measures for volatile organic compounds (VOC) and nitrogen oxides (NO <sub>x</sub> ); Inspection and Maintenance (I/M) basic; nonattainment new source review (NSR) moderate; ozone attainment demonstration; Reasonable Available Control Technology (RACT) Non-Control Technique Guidelines (CTG VOC for major sources; RACT NO <sub>x</sub> for major sources; Reasonable Further Progress VOC and NO <sub>x</sub> – Moderate.
Chicago-Naperville (Wisconsin portion)	Nonattainment NSR Moderate.
Imperial County, CA	Contingency measures for VOC and NO <sub>x</sub> ; Emission Statement; I/M Basic; RACT Non-CTG VOC for major sources; RACT NO <sub>x</sub> for major sources; Ozone Attainment Demonstration; RFP VOC and NO <sub>x</sub> – Moderate.
Kern County (Eastern Kern), CA	Contingency measures for VOC and NO <sub>x</sub> ; Emission Statement; I/M Basic; Nonattainment NSR moderate; RACT NO <sub>x</sub> for major sources; Ozone Attainment Demonstration; RFP VOC and NO <sub>x</sub> – Moderate.
Mariposa County, CA	Emission Statements; Nonattainment NSR –

1		Moderate.
2	Nevada County (Western part), CA	Contingency measures for VOC and NO <sub>x</sub> ; Emission Statement; I/M Basic; RACT Non-CTG VOC for major sources; Ozone Attainment Demonstration; RFP VOC and NO <sub>x</sub> – Moderate.
3		
4	New York-N. New Jersey-Long Island (New York portion)	Contingency measures for VOC and NO <sub>x</sub> ; RACT Non-CTG VOC for major sources; RACT NO <sub>x</sub> for major sources; Ozone Attainment Demonstration; RFP VOC and NO <sub>x</sub> – Moderate.
5		
6	New York-N. New Jersey-Long Island (New Jersey portion)	Contingency measures for VOC and NO <sub>x</sub> ; RACT Non-CTG VOC for major sources; RACT NO <sub>x</sub> for major sources; Ozone Attainment Demonstration; RFP VOC and NO <sub>x</sub> – Moderate.
7		
8		

9 Yet, it is after July 1, 2017 and EPA admits that it has not made a finding of failure to submit for  
10 the states where these nonattainment areas are located. Joint Case Management Statement (Dkt.  
11 No. 28) at 7.

### 13 **III. SUMMARY OF ARGUMENT**

14 It is undisputed that EPA is in violation of the nondiscretionary duty outlined in Section  
15 II.B. for all of the nonattainment areas identified on the table on pages 4-5, above. Therefore,  
16 the Centers are entitled to summary judgment as to liability with respect to EPA's failure to  
17 make findings of failure to submit with respect to all of the nonattainment areas and SIP  
18 elements identified on the above table.

19 As to remedy, for each of the nonattainment areas identified on the table on pages 4-5,  
20 above, the Court should order EPA to make a finding of failure to submit the specified  
21 nonattainment SIP elements for the 2008 ozone NAAQS within 90 days of its order granting  
22 summary judgment. While EPA should actually be able to make the findings of failure to submit  
23 easily in 30 days, Plaintiffs are requesting 90 days because that is what EPA itself requested in

1 the parties' last Clean Air Act deadline case regarding EPA's failure to make findings of failure  
2 to submit. Moreover, making these finding of failure to submit is not a technically complex or  
3 time-consuming task as demonstrated by the declaration of former EPA official David  
4 Howekamp.

#### 6 **IV. INTRODUCTION**

7 Pursuant to Fed. R. Civ. P. 56(c) and the October 27, 2017 Order Setting Schedule (Dkt.  
8 No. 30), Plaintiffs the Centers move for summary judgment on Claim One of their First  
9 Amended Complaint, except for the portions of the claim applicable to the Sheboygan County,  
10 WI and Metro-Denver nonattainment areas, which are now moot solely for the purposes of this  
11 case.<sup>2</sup>

12 Turning to the merits, at issue in this motion are "missed deadline" claims against a  
13 federal agency that has blatantly missed statutory deadlines designed to protect public health and  
14 welfare. EPA does not dispute that it has missed the deadlines addressed in this motion.

15 EPA's missed mandatory duty has serious consequences for public health and welfare.  
16 Despite these serious consequences—and Congressional mandates—EPA has failed to complete  
17 its mandatory duties even though the tasks are relatively straightforward. In light of this, the  
18 Court should order EPA to act within the time frame EPA has requested in previous cases, that is  
19 90 days, in an effort to save people from being killed or otherwise injured from needless air  
20 pollution.

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23 <sup>2</sup> See *supra*, fn. 1.

1 **V. LEGAL BACKGROUND**

2 Congress enacted the Clean Air Act to “**speed up**, expand, and intensify the war against  
3 air pollution in the United States with a view to assuring that the air we breathe throughout the  
4 Nation is wholesome once again.” H.R. Rep. No. 1146, 91st Cong., 2d Sess. 1, 1, 1970 U.S.  
5 Code Cong. & Admin. News 5356, 5356 (emphasis added). At the heart of the Clean Air Act  
6 are National Ambient Air Quality Standards (NAAQS) for a limited number of pollutants that  
7 endanger public health or welfare. 42 U.S.C. § 7409(b). The Supreme Court has explained:

8 Section 109(b)(1) instructs the EPA to set primary ambient air quality standards  
9 “the attainment and maintenance of which ... are requisite to protect the public  
10 health” with “an adequate margin of safety.” 42 U.S.C. § 7409(b)(1). ... The  
11 EPA, “based on” the information about health effects contained in the technical  
12 “criteria” documents [now known as an Integrated Science Assessment] compiled  
under § 108(a)(2), 42 U.S.C. § 7408(a)(2), is to identify the maximum airborne  
concentration of a pollutant that the public health can tolerate, decrease the  
concentration to provide an “adequate” margin of safety, and set the standard at  
that level.

13 *Whitman v. American Trucking Associations*, 531 U.S. 457, 465 (2001) (first ellipsis in original).

14 Congress mandated that the EPA review each criteria document, which EPA now calls an  
15 Integrated Science Assessment, and NAAQS every five years and revise them if necessary to  
16 ensure that they continue to protect public health based on the latest science:

17 Not later than December 31, 1980, and at five-year intervals thereafter, the  
18 Administrator shall complete a thorough review of the criteria published under  
19 section 7408 of this title and the national ambient air quality standards  
20 promulgated under this section and shall make such revisions in such criteria and  
standards and promulgate such new standards as may be appropriate in  
accordance with section 7408 of this title and subsection (b) of this section. The  
Administrator may review and revise criteria or promulgate new standards earlier  
or more frequently than required under this paragraph.

21 42 U.S.C. § 7409(d)(1).  
22  
23

1       The NAAQS then become the heart of the Clean Air Act’s “cooperative federalism”  
 2 scheme. State and local air pollution control agencies come up with State Implementation Plans  
 3 (SIPs), with EPA’s guidance and oversight, and implement the SIPs to ensure that in areas with  
 4 dirty air, that is nonattainment areas, the pollution levels are reduced to below the NAAQS, and  
 5 that in areas with clean air, that is attainment areas, the pollution levels are maintained below the  
 6 NAAQS.

7       As mentioned above in section II, Facts, once EPA sets a new NAAQS such as the 2008  
 8 ozone NAAQS, EPA designates areas as attainment or nonattainment.<sup>3</sup> For areas which EPA  
 9 designates nonattainment, EPA sets a date by which the State must submit SIP elements needed  
 10 for the area to achieve compliance with the new NAAQS. If a State fails to submit a SIP or SIP  
 11 revision by its due date, EPA must make a finding of failure to submit within six months of the  
 12 due date. 42 U.S.C. § 7410(k)(1)(B). EPA’s finding of failure to submit triggers a two year  
 13 “FIP clock.” That is within two years of making a finding of failure to submit, EPA must  
 14 promulgate a federal implementation plan (FIP) to fill the gap left by the State’s failure to submit  
 15 the required SIP. 42 U.S.C. § 7410(c)(1). EPA’s finding of failure to submit for nonattainment  
 16 areas also triggers a “sanctions clock.” 42 U.S.C. § 7509(a), which requires that EPA apply a  
 17 mandatory sanction if the State fails to correct its SIP deficiency within 18 months of EPA’s  
 18 finding of failure to submit. In accordance with 40 C.F.R. § 52.31, the initial sanction after 18  
 19 months is the emissions offset sanction at 42 U.S.C. § 7509(b)(2), which requires new or  
 20 modified sources to offset each unit of emission increases with at least two units of emission

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22       <sup>3</sup> The Fact section contains a discussion of statutory provisions because in a “deadline” suit such  
 23 as this, the central Fact is that EPA has missed its deadlines and the deadlines are contained in  
 statutory provisions.

1 reductions. If the state has not corrected the deficiency within six months after the emissions  
 2 offset sanction is imposed, the state becomes subject to the highway sanction at 42 U.S.C. §  
 3 7509(b)(1), which requires withholding of certain federal highway funds. Any sanction is  
 4 stopped upon a final EPA finding that the state has corrected the SIP deficiency. 40 C.F.R. §  
 5 52.31(d)(5).

## 6 **VI. ARGUMENT**

### 7 **A. THE CENTERS HAVE ESTABLISHED LIABILITY BY VIRTUE OF 8 EPA ADMITTING IT HAS VIOLATED ITS MANDATORY DUTIES.**

9 The Centers' Claim One alleges in relevant part that EPA is in violation of its mandatory  
 10 duty in 42 U.S.C. § 7410(k)(1)(B) to make a finding by July 1, 2017 that the relevant states have  
 11 failed to submit for the following nonattainment areas the following SIP elements for the 2008  
 12 ozone NAAQS:

13 <b>AREA</b>	<b>ELEMENTS</b>
14 Chicago-Naperville (Illinois portion)	Contingency measures for volatile organic compounds (VOC) and nitrogen oxides (NOx); Inspection and Maintenance (I/M) basic; nonattainment new source review (NSR) moderate; ozone attainment demonstration; Reasonable Available Control Technology (RACT) Non-Control Technique Guidelines (CTG VOC for major sources; RACT NOx for major sources; Reasonable Further Progress VOC and NOx – Moderate.
16 Chicago-Naperville (Wisconsin portion)	Nonattainment NSR Moderate.
18 Imperial County, CA	Contingency measures for VOC and NOx; Emission Statement; I/M Basic; RACT Non-CTG VOC for major sources; RACT NOx for major sources; Ozone Attainment Demonstration; RFP VOC and NOx – Moderate.
20 Kern County (Eastern Kern), CA	Contingency measures for VOC and NOx; Emission Statement; I/M Basic; Nonattainment NSR moderate; RACT NOx for major sources; Ozone Attainment Demonstration; RFP VOC and NOx – Moderate.
22 Mariposa County, CA	Emission Statements; Nonattainment NSR – Moderate.
23 Nevada County (Western part), CA	Contingency measures for VOC and NOx; Emission Statement; I/M Basic; RACT Non-CTG VOC for major sources; Ozone Attainment Demonstration; RFP VOC and NOx – Moderate.



New York-N. New Jersey-Long Island (New York portion)	Contingency measures for VOC and NO <sub>x</sub> ; RACT Non-CTG VOC for major sources; RACT NO <sub>x</sub> for major sources; Ozone Attainment Demonstration; RFP VOC and NO <sub>x</sub> – Moderate.
New York-N. New Jersey-Long Island (New Jersey portion)	Contingency measures for VOC and NO <sub>x</sub> ; RACT Non-CTG VOC for major sources; RACT NO <sub>x</sub> for major sources; Ozone Attainment Demonstration; RFP VOC and NO <sub>x</sub> – Moderate.

EPA admits that for each of the areas and nonattainment SIP elements listed on the above table, the relevant state has failed to submit the listed nonattainment SIP element. Def.'s Answer (Dkt. No. 27) at ¶33; Joint Case Management Statement (Dkt. No. 28) at 2, 7-8.<sup>4</sup> EPA further admits that six months from the due date for these SIP submittals has passed and that it has not made findings of failure to submit for the areas and nonattainment SIP elements identified on the table above. Def.'s Answer (Dkt. No. 27) at ¶¶32, 35, Joint Case Management Statement (Dkt. No. 28) at 7-8. Accordingly, Defendant is in violation of its mandatory duty under Clean Air Act section 110(k)(1)(B), 42 U.S.C. § 7410(k)(1)(B), to make a finding of failure to submit for each of the areas and nonattainment SIP elements listed on the above table. Thus, the Centers are entitled to summary judgment and declaratory relief regarding EPA's violations of its mandatory duties set forth above.

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<sup>4</sup> As the parties explain in the Joint Case Management Statement (Dkt. No. 28) at 2, Plaintiffs mistakenly referred to "Nevada County, CA" in their First Amended Complaint rather than "Nevada County (Western Part)." EPA denied the allegations in Plaintiffs' first amended complaint to the extent that they pertain to the "Nevada County (part) remainder area, which has not been designated as in nonattainment. *Id.* Plaintiffs stipulated that they intended the allegations to relate to the Nevada County (Western part) and the parties agreed to resolve their dispute by stipulating that all references to "Nevada County, CA" shall mean "Nevada County (Western part). *Id.* EPA does not dispute the Plaintiffs' Claim One as to Nevada County (Western part). *Id.*

1           **B.       THE CENTERS HAVE STANDING**

2           An organization has standing when: (1) the organization's members have standing in their  
 3 own right; (2) the interests which the organization seeks to protect in the lawsuit are germane to  
 4 the purposes of the organization; and (3) neither the claim asserted nor the relief requested  
 5 requires the individual participation of members in the lawsuit directly. *See Friends of the*  
 6 *Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000). The latter two  
 7 conditions are easily satisfied here: The Centers' interests in safeguarding air quality and in  
 8 protecting public health from the effects of ozone pollution are germane to its organizational  
 9 purposes, *see* Declaration of Lori Ann Burd In Support of Plaintiffs' Motion for Summary  
 10 Judgment ("Burd Decl.") ¶¶ 2, 4-5, and this suit will not require individual participation of  
 11 members.<sup>5</sup>

12           With regard to the first condition, individual organizational members have standing to  
 13 sue in their own right if they have suffered "an 'injury in fact' that is (a) concrete and  
 14 particularized and (b) actual or imminent, not conjectural or hypothetical . . ." *See Friends of the*  
 15 *Earth*, 528 U.S. at 180. These injuries must be "fairly traceable to the challenged action of  
 16 defendant; and . . . it is likely, as opposed to merely speculative, that the [injuries] will be  
 17 redressed by a favorable decision." *Id.* at 180-81. As demonstrated below, this condition is  
 18 likewise satisfied.

19  
 20  
 21 <sup>5</sup> Although this case has two plaintiffs, standing for one plaintiff establishes standing for all  
 22 plaintiffs. *U.S. Dept. of Labor v. Triplett*, 494 U.S. 715, 719 (1990); *United Food &*  
 23 *Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 552 (1996).

1           The Center for Biological Diversity's members live, work, recreate, travel and engage in  
2 other activities throughout the areas that are relevant to this case and will continue to do so on a  
3 regular basis. Declaration of Tamara Strobel in Support of Plaintiffs' Motion for Summary  
4 Judgment (Strobel Decl.) ¶ 5 (CBD has over 61,000 members nationwide, including members in  
5 each of the states at issue in this lawsuit); Declaration of Jeff Miller in Support of Plaintiffs'  
6 Motion for Summary Judgment (Miller Decl.); Burd Decl.; Declaration of Paula Simmonds in  
7 Support of Plaintiffs' Motion for Summary Judgment (Simmonds Decl.); Declaration of Kevin  
8 Bundy (Bundy Decl.); Declaration of Aaron Turkewitz (Turkewitz Decl.); Declaration of Ileene  
9 Anderson. For example, Center for Biological Diversity member Jeff Miller travels to western  
10 Nevada County, Mariposa County and Imperial County regularly and will do so in the future  
11 Miller Decl. ¶¶ 1-6. Mr. Miller is exposed this air pollution when he engages in various  
12 activities like spending time outdoors hiking, bird-watching and engaging in other recreational  
13 activities, and he is concerned about the impact of this exposure on his health. *Id.* ¶¶ 5, 7-8, 10.  
14 Accordingly, ozone pollution in the affected areas threatens and damages, and will continue to  
15 threaten and damage, the health and welfare of Plaintiffs' members as well as their ability to  
16 enjoy the aesthetic qualities of the affected areas and to take advantage of the recreational  
17 opportunities in those areas.

18           Likewise, Center for Biological Diversity member Kevin Bundy regularly hikes in  
19 Yosemite National Park in Mariposa County and also attends conferences and hikes in other  
20 parts of Mariposa County. Bundy Decl. ¶ 2, 3. Mr. Bundy explains that he often hikes in these  
21 areas with his daughter, who suffers from asthma that can be aggravated by ozone pollution.  
22 Bundy Decl. ¶ 5. Unsurprisingly, Mr. Bundy experiences stress when his daughter experiences  
23 respiratory problems and refrains from hiking or spending considerable time outside with his

1 family when poor air quality threatens to trigger his daughter's asthma. Bundy Decl. ¶ 6. When it  
2 is unsafe for his daughter to hike, he also forgoes hiking, which diminishes his enjoyment of  
3 places within Yosemite National Park like Yosemite Valley and the Chilnualna Falls Trail. *Id.*

4 Center for Biological Diversity member Aaron Turkewitz resides in the Greater Chicago  
5 area and he regularly walks or bicycles to work in Hyde Park, as well as spending leisure time  
6 walking in his neighborhood or other parts of Chicago, bicycling, hiking, and gardening.

7 Turkewitz Decl. ¶ 1, 2. On days when ozone levels are elevated, Mr. Turkewitz reconsiders his  
8 outdoor activities. Turkewitz Decl. ¶ 3. When his parents visit him, elevated air pollution levels  
9 essentially restrict them from participating in outdoor activities that they enjoy together. *Id.*

10 Center for Biological Diversity member Paula Simmonds lives in Rockland County, New  
11 York and regularly participates in outdoor activities near her home, including gardening,  
12 kayaking, and taking walks in natural areas. Simmonds Decl. ¶ 1, 2. Ms. Simmonds has asthma  
13 and is concerned about unhealthy air quality that could cause her breathing problems. Simmonds  
14 Decl. ¶ 3. Therefore, she checks the news for air quality reports and would reconsider outdoor  
15 activities that she enjoys if air pollution levels are unsafe. Simmonds Decl. ¶ 4.

16 The Ninth Circuit has held that being "compelled to breathe air less pure than that  
17 mandated by the Clean Air Act" constitutes an injury sufficient to support standing. *NRDC v.*  
18 *U.S. E.P.A.*, 507 F.2d 905, 910 (9th Cir.1974). Even uncertainty about exposure to air pollution  
19 due to EPA's violation of its mandatory duties creates standing for the Center for Biological  
20 Diversity's members like Mr. Miller. *New York Public Interest Research Group v. Whitman*,  
21 321 F.3d 316, 325-326 (2<sup>nd</sup> Cir. 2003). As this case is based on procedural claims, the causation  
22 and redressability requirements of standing are relaxed. *Pacificans for a Scenic Coast v.*

1 *California Department of Transportation*, 204 F. Supp. 3d 1075, 1094 (N.D. Cal. 2016) at fn. 3  
 2 *citing WildEarth Guardians v. U.S. Dep't of Agric.*, 795 F.3d 1148, 1154 (9<sup>th</sup> Cir. 2015).

3 In addition, the Centers have standing via informational injury. EPA's violation of the  
 4 mandatory duties at issue in this motion denies the Center for Biological Diversity's  
 5 Environmental Health Program information which they need to prioritize, plan and conduct their  
 6 work. *See* Burd Decl. at ¶¶4-10. The Center for Biological Diversity is entitled to this  
 7 information under the Clean Air Act and EPA's violation of its mandatory duties is denying the  
 8 Center for Biological Diversity the information they need and are entitled to. *See Center for*  
 9 *Biological Diversity v. Abraham*, 218 F. Supp.2d 1143, 1161 (N.D. Cal. 2002) *citing Federal*  
 10 *Election Comm'n v. Akins*, 524 U.S. 11, 24-25 (1998) (denial of information which would be  
 11 useful for one's work is injury sufficient to establish standing). Thus, standing is established  
 12 here.

13 **C. THE COURT SHOULD REQUIRE EPA TO MAKE FINDINGS OF**  
 14 **FAILURE TO SUBMIT REQUIRED SIP ELEMENTS FOR OZONE**  
 15 **NONATTAINMENT AREAS WITHIN 90 DAYS OF THE COURT'S**  
 16 **ORDER GRANTING SUMMARY JUDGMENT.**

17 In a Clean Air Act deadline case involving EPA missing the deadline for reviewing the  
 18 particulate matter NAAQS, the District of Arizona addressed the burden on EPA to establish the  
 19 appropriate schedule for EPA to come into compliance with its nondiscretionary duty:

18 In such circumstances, the agency carries a heavy burden to show that  
 19 compliance with statutory mandated deadlines is impossible or infeasible.  
 20 Excuses for delay must go beyond the general proposition that further study  
 21 and analysis of materials will make final agency action better, because further  
 22 study will always make everything better, and it is always easier to do  
 23 something with more rather than less time.

22 *American Lung Ass'n v. Browner*, 884 F. Supp. 345, 347 (D.Ariz. 1994) (internal citations  
 23 omitted). *See also Communities for a Better Env't v. EPA*, 2008 U.S. Dist. LEXIS 36647 (N.D.

1 *Cal. May 5, 2008*), at \*6 (same) citing *Maine Ass'n of Handicapped Persons of Portland, Maine*  
 2 *v. Dole*, 623 F. Supp. 920, 926 (D. Me 1985); *Sierra Club v. Gorsuch*, 551 F. Supp. 785, 787  
 3 (N.D. Cal. 1982) (finding agency's burden in demonstrating impossibility was "especially  
 4 heavy").

5 As EPA will not be able to meet this especially heavy burden, the Court should require  
 6 EPA to sign a final rule containing findings of failure to submit for each of the areas and  
 7 nonattainment SIP elements identified on the table on page 11 above for each of the relevant SIP  
 8 elements within 90 days of the Court's order and forward that final rule to the Office of the  
 9 Federal Register within three working days of signature. This remedy is appropriate because, as  
 10 detailed below: (1) 90 days is what EPA stated it needed in the last finding of failure to submit  
 11 deadline case the parties litigated; (2) EPA's illegal delay causes inequality among the states; (3)  
 12 EPA's illegal delay also risks serious public health impacts including illness and even deaths of  
 13 innocent people and public welfare impacts; (4) the task is relatively simple as established by  
 14 Plaintiffs' expert, and (5) EPA has an abysmal record on timeliness with regard to implementing  
 15 the Clean Air Act.

16 **1. In a deadline case litigated between the Parties earlier this year, EPA**  
 17 **confirmed that 90 days is a reasonable timeframe for EPA to make**  
 18 **findings of failure to submit required SIP elements.**

18 Earlier this year, in a case seeking for the Court to require EPA to make findings of  
 19 failure to submit SIPs just as in this case, EPA reported to the Court that EPA could sign final  
 20 rules making findings of failure to submit required SIPs within 90 days of the Court's order in  
 21 that case. *See* EPA's Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment,  
 22 and In Support of EPA's Partial Cross Motion for Summary Judgement, and [Proposed] Order,"  
 23 Case 3:16-cv-05492-TEH, filed July 13, 2017, at 11-12 (attached as Ex. 1). Accordingly, while

1 Plaintiffs believe that EPA could finalize the findings of failure to submit the SIP elements at  
2 issue in this case much more quickly than 90 days from the date of the Court's order, Plaintiffs  
3 are requesting 90 days in light of EPA's prior confirmation that it considers 90 days to be  
4 reasonable.

5           **2. EPA's delay in making the findings provides states that have not made**  
6           **the required SIP submissions with an unfair advantage over those states**  
7           **that have complied with the SIP submittal requirement.**

8           The Clean Air Act is an example of "cooperative federalism" in which states and the  
9 federal EPA both play key roles in ensuring that we have clean, productive air. One of EPA's  
10 key roles is to ensure that the Clean Air Act does not become a "race to the bottom" in which  
11 certain states avoid or delay action to give certain polluting industries in their state an advantage  
12 over those same polluting industries in other states. However, when EPA illegally delays  
13 fulfilling its mandatory duties, such as failing to make findings of failure to submit, it enables the  
14 race to the bottom and allows certain states to gain an unfair advantage over other states. *See,*  
15 *e.g., Duquesne Light Co. v. EPA*, 698 F.2d 456, 471 (D.C. Cir. 1983) ("EPA ... is the ultimate  
16 supervisor, responsible ... for stepping in, should a state fail to develop or to enforce an  
17 acceptable plan. ... EPA is to ensure national uniformity where needed, for example, to ensure  
18 that states do not compete unfairly for industry by offering air quality standards that are too lax  
19 to bring about needed improvements in the air we breathe."). Here, EPA's delay puts complying  
20 states at a competitive disadvantage because polluting industries located in areas that have not  
21 submitted the required SIP elements are not required to internalize the cost of their pollution,  
22 while polluting industries located in complying areas must do so.  
23

1                   **3.       There are serious public health and welfare impacts caused by EPA's**  
 2                   **illegal delay in making findings of failure to submit.**

3                   As explained above in section II, Facts, EPA acknowledges that exposure to ozone  
 4                   pollution causes an array of adverse health impacts. 73 Fed. Reg. at 16,436. Among other health  
 5                   problems, ozone pollution causes decreased lung function and increased respiratory symptoms,  
 6                   leading to emergency department visits, hospital admissions for respiratory causes, and even  
 7                   death. *Id.*

8                   The detrimental effects of ozone pollution extend beyond public health. EPA reports that  
 9                   ozone damages commercial crops, negatively impacting the nation's economy. *Id.* at 16,485-  
 10                  16,486. Damage to native vegetation from ozone pollution results in diminished ecosystem  
 11                  services—the life-sustaining services that ecosystems provide to people for free, such as clean  
 12                  air, clean water and carbon sequestration.

13                  As this is literally a life or death matter, the remedy should be expeditious. Fortunately,  
 14                  as explained below, EPA's task is straightforward and not time-consuming.

15                   **4.       Making the finding is a relatively simple task as demonstrated by**  
 16                   **Plaintiffs' expert.**

17                  Issuing findings of failure to submit is a straightforward process that EPA is easily able  
 18                  to complete within 90 days. It is relatively easy for EPA to track the status of a state's ozone  
 19                  nonattainment area SIP submittals and EPA has listed the status on its own webpage:  
 20                  [https://www3.epa.gov/airquality/urbanair/sipstatus/reports/ozone-](https://www3.epa.gov/airquality/urbanair/sipstatus/reports/ozone-8hr_2008_elembynaqs.html#ozone-8hr_2008_1397)  
 21                  [8hr\\_2008\\_elembynaqs.html#ozone-8hr\\_2008\\_1397](https://www3.epa.gov/airquality/urbanair/sipstatus/reports/ozone-8hr_2008_elembynaqs.html#ozone-8hr_2008_1397). EPA can easily review its files and  
 22                  officially confirm relatively quickly whether there are SIP submittals containing all of the  
 23                  required nonattainment SIP elements for the areas listed on the table on page 11, above.



1 Furthermore, EPA can issue these findings without the need for notice and comment  
2 rulemaking. EPA issued the finding of failure to submit pursuant to this Court's summary  
3 judgment order in *WildEarth Guardians v. Jackson*, 11-cv-5651-YGR without notice and  
4 comment. *See* 78 Fed. Reg. 2,882 (Jan. 15, 2013)

5 The reasonableness of a 90-day period for EPA to make the finding is demonstrated by  
6 David Howekamp, whom Plaintiffs retained as an expert in a case litigated before this Court  
7 earlier this year on the appropriate remedy regarding EPA's failure to make a finding of failure  
8 to submit with respect to a different SIP requirement. Mr. Howekamp was a career employee at  
9 EPA for 31 years. Declaration of David Howekamp in Support of Plaintiffs' Motion for  
10 Summary Judgment (Howekamp Decl.) attached as Ex. 2 at ¶2. For the last 18 of those years, he  
11 was the Director of the Air Division for EPA's Region 9 office in San Francisco. *Id.* In that  
12 position, he managed a budget of over \$40 million and directed a staff of 120 scientists,  
13 engineers and planners in implementing the Clean Air Act. *Id.*

14 Mr. Howekamp has extensive experience in establishing and negotiating rulemaking  
15 schedules; most of the rulemakings produced by his division were performed as a result of court  
16 orders or settlement agreements. *Id.* at ¶3. He was personally responsible for preparing Federal  
17 Register notices making findings of failure to submit all or portions of SIPs, so he has first-hand  
18 knowledge of the technical and policy considerations in such matters and the management  
19 demands and resource requirements for producing these notices. *Id.* at ¶4.

20 Mr. Howekamp establishes that a 30-day timetable for EPA to make the findings of  
21 failure to submit the required elements of a SIP is reasonable because: (1) findings of failure to  
22 submit are routine so there are well-proven templates for rapidly creating, signing and publishing  
23 the required findings; (2) no technical or policy analysis is required but rather a straightforward

determination; and (3) preparing the Federal Register notice is simplified because the majority of the review requirements of more complicated rulemakings by the agency need not be addressed in EPA findings of a failure to submit a SIP. *Id.* at ¶5-6.

**5. EPA's delinquent record of delay in implementing the Clean Air Act demonstrates the need for a short, court-mandated deadline.**

EPA consistently fails to meet Congressional mandated Clean Air Act deadlines. Put simply, when it comes to implementing the Clean Air Act, EPA frequently delays its duty. Indeed, in just this one judicial district, environmental groups have had to file many suits seeking to force EPA to meet mandatory deadlines found in the Clean Air Act. *See e.g. Sierra Club v. Jackson*, 3:10-cv-4060-CRB (N.D. Cal. 2010); *WildEarth Guardians v. Jackson*, 4:09-cv-2453-CW (N.D. Cal. 2009); *Center for Biological Diversity v. Jackson*, 3:10-cv-1846-MMC (N.D. Cal. 2010); *Communities for a Better Environment v. US EPA*, 3:07-cv-3678-JSW (N.D. Cal. 2007). *See also Coalition for Clean Air v. US EPA*, 971 F.2d 219, 228 (9th Cir. 1992).

The Court should reject any arguments by EPA that the Centers' proposed deadlines are impossible to meet. The United States District Court for the District of Arizona was confronted with a similar assertion from EPA in a suit to compel the agency to review the NAAQS for Particulate Matter (PM). The analysis that court utilized applies equally to this case:

In such circumstances, the agency carries a heavy burden to show that compliance with statutory mandated deadlines is impossible or infeasible. Excuses for delay must go beyond the general proposition that further study and analysis of materials will make final agency action better, because further study will always make everything better, and it is always easier to do something with more rather than less time.

*American Lung Ass'n v. Browner*, 884 F. Supp. 345, 347 (D.Ariz. 1994) (internal citations omitted); *see also Sierra Club v. Thomas*, 658 F. Supp. 165, 172 (N.D. Cal. 1987) (the burden on

1 the agency to show impossibility “is especially heavy where the agency has failed to demonstrate  
2 any diligence whatsoever in discharging its statutory duty...and has in fact ignored that duty for  
3 several years.”); *Alabama Power Co. v. Costle*, 636 F.2d 323, 359 (D.C. Cir. 1979) (“The  
4 agency’s burden of justification in such a case is especially heavy.”). In justifying its decision to  
5 order a shorter timeline than that proposed by EPA for the review process, the Arizona district  
6 court pointed out that by allowing the NAAQS review deadline to lapse, “the EPA has not  
7 merely missed a deadline, it has nullified the congressional scheme for a fixed interval review  
8 and revision process.” *American Lung Ass’n v. Browner*, 884 F. Supp. at 348.

9 Notably, although EPA contended that it simply could not perform the review for  
10 particulate matter in less than 4 years and 3 months, *Id.* at 346-347, the agency was nonetheless  
11 able to complete and finalize this PM NAAQS review in 3 years and 3 months. 62 Fed. Reg.  
12 38,652, 38,654 (July 18, 1997). Moreover, the product of this PM NAAQS review process  
13 survived legal challenges raised by both industrial and environmental groups. *American*  
14 *Trucking Assns. v. EPA*, 283 F.3d 355, 358 (D.C. Cir. 2002), *rev’d in part on other grounds, aff’d*  
15 *in part sub nom. Whitman v. American Trucking Associations*, 531 U.S. 457 (2001). Therefore,  
16 the Court should order EPA to sign a final rule regarding findings of failure to submit for the  
17 eight ozone nonattainment areas (or relevant portions thereof) within 90 days of the Court’s  
18 order and requiring EPA to forward the signed rule to the Office of the Federal Register within  
19 three business days of signature. The rules do not become effective until they are published in  
20 the Federal Register so it is important that EPA not cause further delay by footdragging when it  
21 comes to sending the rule of the Office of the Federal Register.

**VII. CONCLUSION**

For the reasons explained above, the Centers respectfully requests that the Court grant summary judgment as to the Centers' Claim One, in relevant part, declare that EPA is in violation of its mandatory duties and order EPA to complete its mandatory duties within 90 days of the Court's Order as set forth in the requested relief section above.

Respectfully submitted,

Date: November 1, 2017

/s/ Keri N. Powell

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*Diversity and Center for Environmental Health*

1  
2 **UNITED STATES DISTRICT COURT**  
3 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**  
4 **SAN FRANCISCO DIVISION**

5 \_\_\_\_\_  
6 CENTER FOR BIOLOGICAL DIVERSITY *et al.*, )  
7 )

8 Plaintiffs, )

9 v. )

10 SCOTT PRUITT, in his official capacity as )  
11 the Administrator of the United States )  
12 Environmental Protection Agency, )  
13 )

14 Defendant. )  
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Case No. 3:17-cv-03239-MMC

**[PROPOSED] ORDER  
GRANTING PLAINTIFFS'  
MOTION FOR  
SUMMARY JUDGMENT**

Before the Court is Plaintiffs' Motion for Summary Judgment (Motion). [Dkt. No. \_\_\_\_]. The Court having considered the Motion, Defendant Scott Pruitt in his official capacity as Administrator of the United States Environmental Protection Agency's (EPA) opposition, [Dkt. No. \_\_\_\_], Plaintiffs' Reply in support of the Motion, [Dkt. No. \_\_\_\_] and the parties oral arguments on the Motion, finds and concludes the following:

The Motion addresses Claim One of Plaintiffs' First Amended Complaint for Injunctive and Declaratory Relief [Dkt. No. 24]. The parties agree that the portions of Claim One pertaining to the Sheboygan County, WI and Denver-Boulder-Greeley-Ft. Collins-Loveland ("Metro-Denver") nonattainment areas are moot and are therefore dismissed.

The parties also agree that EPA has violated its Clean Air Act mandatory duties set out in Claim One with regard to the following nonattainment areas: Chicago-Naperville (Illinois portion); Chicago-Naperville (Wisconsin portion); Imperial County, CA; Kern County (Eastern Kern), CA; Mariposa County, CA; Nevada County (Western part), CA; New York-N. New Jersey-Long Island (New York portion); and New York-N. New Jersey-Long Island (New Jersey portions). Thus, liability is not contested and summary judgment shall enter for Plaintiffs as to these non-moot claims. The only issue left for the Court to decide is the appropriate remedy, that is, how long EPA should be permitted to complete these mandatory duties which the parties agree have deadlines which have already past.

The Court concludes that EPA shall have 90 days from the date of this order to make a finding of failure to submit pursuant to 42 U.S.C. § 7410(k)(1)(B) regarding the required nonattainment SIP for the 2008 ozone NAAQS, 73 Fed. Reg. 16,436 (Mar. 27, 2008), for the each of the following areas and specified nonattainment SIP elements:

AREA	ELEMENTS
Chicago-Naperville (Illinois portion)	Contingency measures for volatile organic compounds (VOC) and nitrogen oxides (NOx); Inspection and Maintenance (I/M) basic; nonattainment new source review (NSR) moderate; ozone attainment demonstration; Reasonable Available Control

	Technology (RACT) Non-Control Technique Guidelines (CTG) VOC for major sources; RACT NO <sub>x</sub> for major sources; Reasonable Further Progress (RFP) VOC and NO <sub>x</sub> – Moderate.
Chicago-Naperville (Wisconsin portion)	Nonattainment NSR Moderate.
Imperial County, CA	Contingency measures for VOC and NO <sub>x</sub> ; Emission Statement; I/M Basic; RACT Non-CTG VOC for major sources; RACT NO <sub>x</sub> for major sources; Ozone Attainment Demonstration; RFP VOC and NO <sub>x</sub> – Moderate.
Kern County (Eastern Kern), CA	Contingency measures for VOC and NO <sub>x</sub> ; Emission Statement; I/M Basic; Nonattainment NSR moderate; RACT NO <sub>x</sub> for major sources; Ozone Attainment Demonstration; RFP VOC and NO <sub>x</sub> – Moderate.
Mariposa County, CA	Emission Statements; Nonattainment NSR – Moderate.
Nevada County (Western part), CA	Contingency measures for VOC and NO <sub>x</sub> ; Emission Statement; I/M Basic; RACT Non-CTG VOC for major sources; Ozone Attainment Demonstration; RFP VOC and NO <sub>x</sub> – Moderate.
New York-N. New Jersey-Long Island (New York portion)	Contingency measures for VOC and NO <sub>x</sub> ; RACT Non-CTG VOC for major sources; RACT NO <sub>x</sub> for major sources; Ozone Attainment Demonstration; RFP VOC and NO <sub>x</sub> – Moderate.
New York-N. New Jersey-Long Island (New Jersey portion)	Contingency measures for VOC and NO <sub>x</sub> ; RACT Non-CTG VOC for major sources; RACT NO <sub>x</sub> for major sources; Ozone Attainment Demonstration; RFP VOC and NO <sub>x</sub> – Moderate.

The Court finds that such a schedule is appropriate because EPA's failure to make findings of failure to submit for states that failed to submit timely SIPs to address their ozone nonattainment areas extends the amount of time that residents of these areas will suffer from the serious public health and welfare consequences of unhealthy air quality. Such adverse impacts include decreased lung function, aggravation of asthma, increased visits to doctors' offices and emergency rooms, increased school and work absences, and long-term lung damage that can lead to reduced quality of life and even death. Furthermore, EPA's failure to perform its mandatory duties means that air pollution sources located in nonattainment areas in non-complying states

have an unfair competitive advantage over air pollution sources located in nonattainment areas in complying states, because sources in non-complying states are not required to control their pollution to the level needed to achieve healthy air quality. Also, 90 days is what EPA argued for in its last case in this Court in which it failure to make findings of failure to submit. Balanced against the fact that this finding of failure to submit is a relatively simple task as explained by Plaintiffs' expert and former EPA manager David Howekamp and that EPA has a long history of illegal delays, a 90-day deadline is entirely appropriate. EPA failed to meet its heavy burden of demonstrating that a 90-day schedule is impossible.

Therefore, it is **ORDERED** that Defendant Scott Pruitt, in his official capacity as Administrator of the Environmental Protection Agency is in violation his mandatory duties set forth above.

It is **FURTHER ORDERED** that Defendant shall:

1) sign a notice make a final finding of failure to submit the required nonattainment SIP for the 2008 ozone NAAQS for the each of the following areas and specified nonattainment SIP elements:

AREA	ELEMENTS
Chicago-Naperville (Illinois portion)	Contingency measures for volatile organic compounds (VOC) and nitrogen oxides (NOx); Inspection and Maintenance (I/M) basic; nonattainment new source review (NSR) moderate; ozone attainment demonstration; Reasonable Available Control Technology (RACT) Non-Control Technique Guidelines (CTG) VOC for major sources; RACT NOx for major sources; Reasonable Further Progress (RFP) VOC and NOx – Moderate.
Chicago-Naperville (Wisconsin portion)	Nonattainment NSR Moderate.
Imperial County, CA	Contingency measures for VOC and NOx; Emission Statement; I/M Basic; RACT Non-CTG VOC for major sources; RACT NOx for major sources; Ozone



	Attainment Demonstration; RFP VOC and NO <sub>x</sub> – Moderate.
Kern County (Eastern Kern), CA	Contingency measures for VOC and NO <sub>x</sub> ; Emission Statement; I/M Basic; Nonattainment NSR moderate; RACT NO <sub>x</sub> for major sources; Ozone Attainment Demonstration; RFP VOC and NO <sub>x</sub> – Moderate.
Mariposa County, CA	Emission Statements; Nonattainment NSR – Moderate.
Nevada County (Western part), CA	Contingency measures for VOC and NO <sub>x</sub> ; Emission Statement; I/M Basic; RACT Non-CTG VOC for major sources; Ozone Attainment Demonstration; RFP VOC and NO <sub>x</sub> – Moderate.
New York-N. New Jersey-Long Island (New York portion)	Contingency measures for VOC and NO <sub>x</sub> ; RACT Non-CTG VOC for major sources; RACT NO <sub>x</sub> for major sources; Ozone Attainment Demonstration; RFP VOC and NO <sub>x</sub> – Moderate.
New York-N. New Jersey-Long Island (New Jersey portion)	Contingency measures for VOC and NO <sub>x</sub> ; RACT Non-CTG VOC for major sources; RACT NO <sub>x</sub> for major sources; Ozone Attainment Demonstration; RFP VOC and NO <sub>x</sub> – Moderate.

2) forward within three working days of signature all of the signed notices required by paragraph 1 above to the Office of the Federal Register for review and publication.

**IT IS SO ORDERED.**

Dated: \_\_\_\_\_

\_\_\_\_\_  
MAXINE M. CHESNEY  
United States District Judge

1                                   **UNITED STATES DISTRICT COURT**  
2                                   **NORTHERN DISTRICT OF CALIFORNIA**

3 \_\_\_\_\_ )  
4 CENTER FOR BIOLOGICAL DIVERSITY, *et al.*, )

5 ) Case No. 3:17-cv-3239-MMC  
6 )

7 ) **DECLARATION OF**  
8 ) **AARON TURKEWITZ**

9 Plaintiffs,

10 ) (Clean Air Act, 42 U.S.C. §§ 7401 *et. seq.*)

11 v.

12 SCOTT PRUITT,  
13 in his official capacity as Administrator of the  
14 United States Environmental Protection Agency,

15 Defendant.

16                                   **DECLARATION OF AARON P. TURKEWITZ**

17 I, Aaron Turkewitz, do declare that the following statements are true and correct to  
18 the best of my knowledge, information, and belief, and are based on my personal  
19 experiences and my review of publicly available information:

- 20                   1. I have been a continuous member of the Center for Biological Diversity  
21                   since 2005. I live at 5410 S. Blackstone Avenue in Cook County, Illinois  
22                   with my wife. My home is located in the greater Chicago area, and I have  
23

1 lived there since 1993. My elderly mother (until recently together with  
2 my father) visits every summer for several weeks. I work in Hyde Park  
3 and I walk or bicycle daily to work, as well as spending a great deal of  
4 my leisure time walking in the neighborhood or other parts of Chicago.

5  
6 2. I enjoy spending time outdoors participating in various activities. I am an  
7 avid gardener, working both in my own front and backyard gardens as  
8 well as in community gardens. I also enjoy bicycling for pleasure. My  
9 wife and I often go for hikes to local parks, such as Jackson Park behind  
10 the Museum of Science and Industry. We will continue to engage in  
11 these activities on a regular basis.

12  
13 3. I am concerned about the air quality in the areas where I work, live, and  
14 enjoy recreational activities on a daily basis. I follow the news, primarily  
15 through both the online Chicago Tribune and Chicago Sun-Times, and  
16 keep abreast of atmospheric conditions at [www.wunderground.com](http://www.wunderground.com). I  
17 pay attention to the levels of ozone so that I will know whether or not it  
18 is healthy to breathe the air outside. If levels become elevated or  
19 dangerous, I reconsider taking part in some of the outdoor activities that I  
20 enjoy. When pollutant levels are high during my mother's visits, she is  
21 similarly restricted from participating in the outdoor activities that she  
22 also enjoys.  
23

- 1 4. I know that pollution has a major impact on air quality in Chicago. I  
2 understand that the Environmental Protection Agency, or EPA, regulates  
3 air pollution, and that the Clean Air Act requires States to submit  
4 implementation plans for controlling pollution. I know that the deadline  
5 for the Chicago ozone nonattainment area's state implementation plan  
6 has passed, but the EPA has not yet made a finding of failure to submit  
7 against Illinois and Wisconsin.  
8
- 9 5. I consider myself and my mother to be harmed by air pollution in  
10 Chicago. I am concerned that EPA's illegal delay in issuing a finding of  
11 failure to submit means that I am, and will continue to be, exposed to  
12 ozone pollution in Chicago for longer than the Clean Air Act allows.  
13
- 14 6. I know that the Center for Biological Diversity has filed a lawsuit against  
15 the EPA for its failure to hold States accountable for their failures to file  
16 implementation plans with the agency. If the Center prevails in this case,  
17 the EPA will be required to make findings of failure to submit State  
18 implementation plans for several geographical areas and publish them in  
19 the Federal Register. Once the EPA acts, I will be less concerned about  
20 air pollution in Chicago because we will be one step closer to having a  
21 plan to deal with the damage and reduce the pollution.  
22  
23

1 Pursuant to 28 U.S.C. §1746, I declare under penalty of perjury that the foregoing  
2 is a true and correct statement.

3  
4 Executed this 31<sup>st</sup> day of October, 2017.

5  
6  
7 s/ Aaron Turkewitz  
8 Aaron Turkewitz  
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28 DECLARATION OF AARON TURKEWITZ 3:17-cv-3239-MMC- 4

CENTER FOR BIOLOGICAL DIVERSITY, *et al.*,  
  
Plaintiffs,  
  
v.  
  
SCOTT PRUITT,  
in his official capacity as Administrator of the  
United States Environmental Protection Agency,  
  
Defendant.

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) Case No. 3:17-cv-3239-MMC  
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) **DECLARATION OF**  
) **JEFF MILLER**  
)  
) (Clean Air Act, 42 U.S.C. §§ 7401 *et seq.*)  
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1 birdwatcher. I enjoy spending time outdoors participating in various  
2 activities, including hiking and bird watching.

3 2. I have visited several locations in western Nevada County, CA since  
4 2009 specifically to hike and view birds and other wildlife. For example,  
5 from October 19-21, 2017 I was in Nevada City and Grass Valley in the  
6 western portion of Nevada County. I am actively looking to purchase  
7 property in the vicinity of Nevada City and Grass Valley to continue  
8 enjoying the outdoors in this area.  
9

10 3. I have a brother in-law, sister in-law and niece that live in Truckee,  
11 California. I visit Truckee several times each year, and have enjoyed the  
12 scenery driving on highways 20 and 49 in western Nevada County so  
13 much that I routinely stop at natural areas to explore and look for birds. I  
14 just visited the Nevada City and Grass Valley area on October 19-21,  
15 2017, and I will return in January 2018 to continue looking at properties  
16 for sale, and to do additional hiking and bird watching in the area.  
17

18 4. I visit Imperial County often for bird watching, especially the Salton Sea  
19 area. For example, I was in Imperial County bird watching in February  
20 and May 2010, January 2011, March 2012, March 2013, November  
21 2015, and February 2016. I just spent two day in September 2017  
22 birdwatching at and around the Salton Sea National Wildlife Refuge in  
23

1 Imperial County. I will return to the Salton Sea area in February or  
2 March of 2018.

3 5. Imperial County and the Salton Sea area have notoriously bad air quality,  
4 which I have experienced almost every time I visit the Salton Sea area. In  
5 addition to windblown dust and agricultural pesticides and fertilizers, I  
6 know that some of the industrial facilities and electrical plants which I  
7 see around the Salton Sea contribute nitrogen oxides and volatile organic  
8 compounds which lead to ozone pollution.

9  
10 6. I also visit the Yosemite Valley area in Mariposa County for bird  
11 watching, hiking and wildlife viewing. For example, I was in Yosemite  
12 Valley hiking and bird watching in March 2011, June 2012, and in  
13 January, February and August 2014. I will return to the Yosemite Valley  
14 in summer of 2018.

15  
16 7. When I was in the Yosemite Valley in 2012 I experienced very bad air  
17 quality in the park.

18  
19 8. I care about levels of air pollution in the areas where I live and recreate. I  
20 pay attention to the news about air quality so that I can determine  
21 whether or not it is a good air day to spend time outside. Activities like  
22 hiking and birding require a lot of heavy breathing, sometimes at high  
23



1 altitudes where the air is thinner. If ozone levels are elevated, I would  
2 reconsider taking difficult hikes for the sake of my lungs.

3 9. I understand that the Environmental Protection Agency, or EPA, has the  
4 power to regulate air pollution, and that the Clean Air Act requires states  
5 to submit implementation plans for controlling pollution under the Clean  
6 Air Act.  
7


8 10. I know that California missed the deadline for the submission of the  
9 ozone nonattainment area state implementation plans for western Nevada  
10 County, Mariposa County and Imperial County, but the EPA has not yet  
11 made a finding of failure to submit against the State of California. I  
12 consider myself harmed by air pollution in western Nevada County,  
13 Mariposa County and Imperial County, California. I am concerned that  
14 EPA's illegal delay in issuing a finding of failure to submit means that I  
15 have been, and will continue to be, exposed to ozone pollution in western  
16 Nevada County, Mariposa County and Imperial County for longer than  
17 the Clean Air Act allows.  
18

19 11. I know that the Center for Biological Diversity has filed a lawsuit against  
20 the EPA for its failure to hold states accountable for their failures to file  
21 implementation plans with the agency. If the Center prevails in this case,  
22 the EPA will need to make findings of failure to submit state  
23

1 implementation plans for several geographical areas and publish them in  
2 the Federal Register. Once the EPA acts, I will be less concerned about  
3 air pollution when I travel through and recreate in western Nevada  
4 County, Mariposa County and Imperial County, because we will be one  
5 step closer to having a plan to reduce the pollution. The implementation  
6 of an air quality plan under the Clean Air Act will make it more likely  
7 that I would buy property in western Nevada County. It will also make  
8 the time I spend in western Nevada County, Mariposa County and  
9 Imperial County more healthful and productive.  
10

11 Pursuant to 28 U.S.C. §1746, I declare under penalty of perjury that the foregoing  
12 is a true and correct statement.  
13

14 Executed this 30<sup>th</sup> day of October, 2017.  
15

16   
17 Jeff Miller  
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28 DECLARATION OF JEFF MILLER 3:17-cv-3239-MMC- 5

1  
2 **UNITED STATES DISTRICT COURT**  
3 **NORTHERN DISTRICT OF CALIFORNIA**

4 \_\_\_\_\_ )  
5 CENTER FOR BIOLOGICAL DIVERSITY, *et al.*, )

6 ) Case No. 3:17-cv-3239-MMC  
7 )

8 ) **DECLARATION OF**  
9 ) **ILEENE ANDERSON**

10 Plaintiffs,

11 ) (Clean Air Act, 42 U.S.C. §§ 7401 *et. seq.*)

12 v.

13 SCOTT PRUITT,  
14 in his official capacity as Administrator of the  
15 United States Environmental Protection Agency,

16 Defendant.  
17 \_\_\_\_\_ )

18 **DECLARATION OF ILEENE ANDERSON**  
19

20 I, Ileene Anderson, do declare that the following statements are true and correct to  
21 the best of my knowledge, information, and belief, and are based on my personal  
22 experiences and my review of publicly available information:  
23

- 1           1. I have been a continuous member of the Center for Biological Diversity  
2           since 1999. I live at in Los Angeles County, California with my family. I  
3           work in the City of Los Angeles, California.  
4
- 5           2. I enjoy spending time outdoors participating in various activities. That  
6           includes hiking, going for nature walks, botanizing and birding. I like to  
7           visit places like the Salton Sea shore, the Algodones Dunes, Anza-  
8           Borrego Desert State Park, San Felipe Marsh, Milpitas Wash, the Cargo  
9           Muchacho Mountains, the Colorado River and other areas in Imperial  
10          County and the Desert Tortoise Research Natural Area, the Rand and El  
11          Paso Mountains, Red Rock Canyon State Park, Butterbrecht Springs, the  
12          Indian Wells Valley and other areas in Eastern Kern County. I will  
13          continue to visit Eastern Kern County and Imperial County on a regular  
14          basis.  
15
- 16          3. I am 59 years old, and while I do not currently suffer from any health  
17          conditions that affect my breathing, I worry that as I grow older, the air  
18          pollution will take a toll on my lungs. To stay healthy and active in  
19          California, I need to exercise, and I prefer to do so outdoors.  
20
- 21          4. I care deeply about levels of air pollution in the areas where I work, play,  
22          and live. I pay attention to the news about air quality so that I can  
23

1 determine whether or not it is a good air day to spend time outside. When  
2 levels become dangerously elevated, I curtail my outdoor activities.

3 5. I understand that the Environmental Protection Agency, or EPA, has the  
4 power to regulate air pollution. I also understand that the EPA requires  
5 States to submit implementation plans for controlling pollution under the  
6 Clean Air Act. I know that California missed the deadlines for the  
7 Imperial County and Eastern Kern County implementation plans, but the  
8 EPA has not yet made a finding of failure to submit against the State of  
9 California. I consider myself harmed by air pollution in Imperial County,  
10 California and the Eastern portion of Kern County, California. I am  
11 concerned that EPA's illegal delay in issuing a finding of failure to  
12 submit means that I have been, and will continue to be, exposed to ozone  
13 pollution in Eastern Kern and Imperial Counties for longer than the Clean  
14 Air Act allows.

15  
16  
17 6. I know that the Center for Biological Diversity has filed a lawsuit against  
18 the EPA for its failure to hold States accountable for their failures to file  
19 implementation plans with the agency. If the Center prevails in this case,  
20 the EPA will need to make findings of failure to submit State  
21 implementation plans for several geographical areas and publish them in  
22 the Federal Register. Once the EPA acts, I will be less concerned about  
23

1 air pollution in California because we will be one step closer to having a  
2 plan to deal with the damage and reduce the pollution.  
3

4 Pursuant to 28 U.S.C. §1746, I declare under penalty of perjury that the foregoing  
5 is a true and correct statement.  
6

7  
8 Executed this 31 day of October, 2017.

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Ileene Anderson

1                                   **UNITED STATES DISTRICT COURT**  
2                                   **NORTHERN DISTRICT OF CALIFORNIA**

3                                   \_\_\_\_\_) )  
4                                   CENTER FOR BIOLOGICAL DIVERSITY, *et al.*, )

5                                   ) Case No. 3:17-cv-3239-MMC  
6                                   )

7                                   ) **DECLARATION OF**  
8                                   ) **KEVIN BUNDY**

9                                   Plaintiffs, )

10                                  ) (Clean Air Act, 42 U.S.C. §§ 7401 *et. seq.*)

11                                  v. )

12                                  SCOTT PRUITT, )  
13                                  in his official capacity as Administrator of the )  
14                                  United States Environmental Protection Agency, )

15                                  Defendant. )  
16                                  \_\_\_\_\_)

17                                   **DECLARATION OF KEVIN BUNDY**

18                                  I, Kevin Bundy, do declare that the following statements are true and correct to the  
19                                  best of my knowledge, information, and belief, and are based on my personal  
20                                  experiences and my review of publicly available information:

- 21                                  1. I have been a continuous member of the Center for Biological Diversity  
22                                       since October 2009. I live at 1611 Chestnut Street, Berkeley, California  
23                                       with my partner and six-year-old daughter. With the exception of two

1 years in Reno, Nevada, I have lived in California continuously since  
2 1993. Since coming to California, I have spent a lot of time outside  
3 exploring California's natural beauty. Of particular interest to me are the  
4 northern coast and the Sierra Nevada range, including Yosemite National  
5 Park.  
6

- 7 2. I enjoy spending time outdoors participating in various activities,  
8 including vigorous alpine hikes. I love to visit the Yosemite Valley in  
9 Yosemite National Park. Places in Mariposa County like the Chilnualna  
10 Falls trail in Yosemite National Park and the community of Wawona are  
11 places near and dear to my heart. I often attend an annual environmental  
12 law conference held at the Tenaya Lodge in Fish Camp, just outside  
13 Yosemite National Park in Mariposa County. I just attended the  
14 conference and hiked the Chilnualna Falls trail over the weekend of  
15 October 20-22, 2017. I am planning on attending the conference again in  
16 October 2018 and hiking the Chilnualna Falls trail at that time. I have  
17 attended the conference several times since 2006, and hiking the  
18 Chilnualna Falls trail is always a highlight of the experience. The trail  
19 involves a vigorous climb alongside a series of waterfalls on Chilnualna  
20 Creek, with several spectacular vistas back across the South Fork Merced  
21 River watershed along the way.  
22  
23



- 1           3. I also enjoy traveling to areas of Mariposa County with my family. In  
2           December 2016, my family and I spent several days at the Big Trees  
3           Lodge (formerly the Wawona Hotel) in Wawona. I hiked both the  
4           Chilnualna Falls trail near Wawona and the Mirror Lake trail in Yosemite  
5           Valley with my daughter on that trip. My family and I are currently  
6           making plans to travel to the Wawona area again this December, and we  
7           intend to hike or snowshoe in Yosemite National Park during that time.  
8
- 9           4. My family and I have also stayed at the Yosemite Bug Hostel in  
10          Midpines, Mariposa County, on multiple occasions. During our stays at  
11          the Bug, we have traveled into Yosemite Valley, hiked the Mirror Lake  
12          Trail, and snowshoed near Badger Pass. We enjoy staying at the Bug and  
13          intend to return there in coming years.  
14
- 15          5. My daughter suffers from asthma, which tends to be triggered by  
16          respiratory infections, exercise, and poor air quality. During the recent  
17          fires in Northern California, the air quality near my home in Berkeley  
18          deteriorated considerably as smoke drifted southward from the fires. My  
19          daughter was coughing frequently for more than a week, and she became  
20          quite ill after several days of exposure to poor air quality. I gave her  
21          albuterol via an inhaler frequently during that time in order to prevent an  
22          asthma attack and to reduce her respiratory distress. To keep my daughter  
23

1 healthy in light of her breathing condition, I need to monitor both her  
2 respiratory health and the conditions that can trigger her asthma very  
3 carefully. My daughter's asthma causes me and my partner considerable  
4 stress, and we will take precautions to avoid conditions that aggravate her  
5 asthma, even if that means curtailing activities that we all enjoy.  
6

7 6. I care about levels of air pollution in the areas where I work, play, and  
8 live. I pay attention to the news about air quality so that I can determine  
9 whether or not it is a good air day for my daughter to spend time outside.  
10 Hiking, which my family enjoys doing together, requires a lot of heavy  
11 breathing, sometimes at high altitudes where the air is thinner. If I know  
12 that air quality will be poor in an area where my family is planning to  
13 hike, I will refrain from hiking or spending considerable time outside for  
14 the sake of my daughter's lungs. This is because I understand from  
15 speaking with my daughter's pediatrician that both exercise and poor air  
16 quality may trigger my daughter's asthma. If I do not feel it is safe or  
17 prudent for my daughter to hike, I will also forgo hiking, which  
18 diminishes my enjoyment of places within Yosemite National Park like  
19 Yosemite Valley and the Chilnualna Falls Trail.  
20  
21

22 7. When I am hiking the Chilnualna Falls trail without my family, I enjoy  
23 the vistas opening southward and southwestward across the South Fork

1 Merced River from several vantage points along the trail. Poor air quality  
2 can create a haze that interferes with the view and my aesthetic  
3 enjoyment of the Chilnualna Falls hike. I understand that ozone and its  
4 precursor pollutants can contribute to haze that interferes with views.

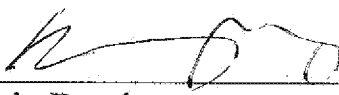
5  
6 8. I understand that the Environmental Protection Agency, or EPA, has the  
7 power to regulate air pollution, and that the Clean Air Act requires States  
8 to submit implementation plans for controlling pollution under the Clean  
9 Air Act. I know that California missed the deadline for the submission of  
10 the Mariposa County ozone nonattainment area state implementation  
11 plan, but the EPA has not yet made a finding of failure to submit against  
12 the State of California. I consider myself harmed by air pollution in  
13 Mariposa County, California. I am concerned that EPA's illegal delay in  
14 issuing a finding of failure to submit means that I and my daughter will  
15 continue to be exposed to ozone pollution in Mariposa County for longer  
16 than the Clean Air Act allows.

17  
18 9. I know that the Center for Biological Diversity has filed a lawsuit against  
19 the EPA for its failure to hold States accountable for their failures to file  
20 implementation plans with the agency. If the Center prevails in this case,  
21 the EPA will need to make findings of failure to submit State  
22 implementation plans for several geographical areas and publish them in  
23

1 the Federal Register. Once the EPA acts, I will be less concerned about  
2 air pollution when I travel to Mariposa County and the portions of  
3 Yosemite National Park within Mariposa County because we will be one  
4 step closer to having a plan to reduce the pollution.  
5

6  
7 Pursuant to 28 U.S.C. §1746, I declare under penalty of perjury that the foregoing  
8 is a true and correct statement.  
9

10 Executed this 31st day of October, 2017.

11   
12 \_\_\_\_\_  
Kevin Bundy

1 UNITED STATES DISTRICT COURT  
2 NORTHERN DISTRICT OF CALIFORNIA

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CENTER FOR BIOLOGICAL DIVERSITY, *et al.*,

Case No. 3:17-cv-3239-MMC

**DECLARATION OF  
PAULA SIMMONDS**

Plaintiffs,

v.

SCOTT PRUITT,  
in his official capacity as Administrator of the  
United States Environmental Protection Agency,

Defendant.

(Clean Air Act, 42 U.S.C. §§ 7401 *et. seq.*)

**DECLARATION OF PAULA SIMMONDS**

I, Paula Simmonds, do declare that the following statements are true and correct to the best of my knowledge, information, and belief, and are based on my personal experiences and my review of publicly available information:

1. I have been a continuous member of the Center for Biological Diversity since April 3, 2013. I live at 7 Sunset Terrace, Suffern, in Rockland County, New York with my husband Isaac Bikel who is 71 years old. My

1 home is located in the greater metropolitan New York City area, and I  
2 work from home. I am 57 years old and I have 4 children, 3 stepchildren,  
3 4 grandchildren, 10 step grandchildren and 6 step great-grandchildren.  
4 They all either come to visit me or live in the NYC/New Jersey area. One  
5 of my daughters, who now lives abroad, suffers from asthma and  
6 migraines whenever she visits the New York metropolitan area. I also  
7 have elderly parents who live in East Patchogue, Long Island. They are  
8 respectively 81 and 82. Both suffer from congestive heart failure.

- 10 2. I enjoy spending time outdoors participating in various activities, such as  
11 gardening in my yard, kayaking, bicycling, and taking walks both solo  
12 and with my family, in natural areas in Rockland County near my home,  
13 as well as while visiting family on Long Island, in Queens on Rockaway  
14 Beach, and during recreational travel in Manhattan, New York. I also  
15 enjoy hiking, walking, and kayaking in Bergen, and Passaic Counties in  
16 New Jersey, and I visit family often in Ocean County, New Jersey. I  
17 worry about my children, grandchildren, husband, and parents being  
18 exposed to poor air quality during our outdoor recreational time together  
19 and worry that they will suffer from asthma, migraines, bronchitis and  
20 other respiratory difficulties.  
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1           3. From a young age, I have suffered from asthma. While my asthma has  
2           generally been under control, I worry that increased air pollution will  
3           cause me to have breathing problems in the future. The last time I needed  
4           to take prescribed medication for my asthma was in 2015. I have taken  
5           over the counter inhalers for my asthma in 2017. I also suffer from  
6           painful sinus related migraines which are exacerbated during days when  
7           the ozone count is high. I take medicine including 'Tylenol Sinus Severe'  
8           for the migraines on a regular basis, including in 2017. I also suffer from  
9           regular sinus infections and laryngitis. Most recently, in September 2017,  
10          I took an antibiotic called Zithromax for a sinus infection and in October  
11          2017 Claritin nasal spray in an attempt to prevent another sinus infection.  
12          My husband suffers from frequent bronchitis and regular nosebleeds and  
13          has had to take antibiotics and other medicine such as Robitussin,  
14          prescribed cough medicine, Flonase and Mucinex regularly for these  
15          conditions. My daughter has required medicine for asthma and migraines,  
16          and my parents require ongoing treatment for congestive heart failure and  
17          shortness of breath.  
18

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20  
21          4. I am concerned about the air quality in the areas where I work, live, and  
22          enjoy recreational activities on a daily basis. I follow the news on T.V.  
23          and in the papers regarding the levels of ozone and particulate matter so

1 that I will know whether or not it is healthy to breathe the air outside. If  
2 levels become elevated or dangerous, I would rethink taking part in some  
3 of the outdoor activities that I enjoy.  
4

5 5. I understand that the Environmental Protection Agency, or EPA, has the  
6 power to regulate air pollution, and that the Clean Air Act requires States  
7 to submit implementation plans for controlling pollution. I know that the  
8 deadline for the New York City ozone nonattainment area's state  
9 implementation plan has passed, but the EPA has not yet made a finding  
10 of failure to submit against New York and New Jersey in the New York  
11 City metropolitan area. I consider myself and my family to be harmed by  
12 air pollution in the Metro-New York City nonattainment area. I am  
13 concerned that EPA's illegal delay in issuing a finding of failure to  
14 submit means that along with my family, I am, and will continue to be,  
15 exposed to ozone pollution in the Metro-New York City area for longer  
16 than the Clean Air Act allows.  
17

18  
19 6. I know that the Center for Biological Diversity has filed a lawsuit against  
20 the EPA for its failure to hold States accountable for their failures to file  
21 implementation plans with the agency. If the Center prevails in this case,  
22 the EPA will be required to make findings of failure to submit state  
23 implementation plans for several geographical areas and publish them in  
24


25  
26  
27  
28 DECLARATION OF PAULA SIMMONDS 3:17-cv-3239-MMC- 4



1 the Federal Register. Once the EPA acts, I will be less concerned about  
2 air pollution in the Metro-New York City nonattainment area because we  
3 will be one step closer to having a plan to reduce the pollution.  
4

5  
6 Pursuant to 28 U.S.C. §1746, I declare under penalty of perjury that the foregoing  
7 is a true and correct statement.  
8

9 Executed this 1<sup>st</sup> day of November, 2017.

10   
11 Paula Simmonds  
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CENTER FOR BIOLOGICAL DIVERSITY *et al.*,  
Plaintiffs,  
v.  
SCOTT PRUITT,  
in his official capacity as Administrator of the  
United States Environmental Protection Agency,  
Defendant.

**DECLARATION OF TAMARA STROBEL IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

1. I have personal knowledge of the facts and statements contained herein and, if called as a witness, could and would competently testify thereto. I am a Senior Membership Associate at the Center for Biological Diversity (“CBD”). I have been a Senior Membership Associate for approximately 6 years.

2. In my role, I work on aspects of CBD's customer service functions related to members, including maintaining an accurate list of members and managing the organization's member database.

1           3.       CBD is a membership organization incorporated under the laws of the State of  
2 California. It is recognized as a not-for-profit corporation under Section 501(c)(3) of the United  
3 States Internal Revenue Code.

4           4.       When an individual becomes a member of CBD, his or her current residential  
5 address is recorded in CBD's membership database. This database is regularly updated each  
6 business day to add new members, reflect address changes, and change membership status for  
7 those who are no longer active members.

8           5.       CBD currently has over 61,000 members nationwide. We have members in every  
9 state. CBD has approximately 16,019 members in the following states, which are affected by  
10 EPA's failure to make mandatory findings under the Clean Air Act and are within the  
11 geographic areas that are subject of this lawsuit, including members in: California (13,299),  
12 Illinois (1,887), and Wisconsin (833).

13  
14           I declare under penalty of perjury that the foregoing is true and correct to the best of my  
15 knowledge and belief.

16           Executed on October 30, 2017.

17  
18           **Tamara Strobel**

19           Tamara Strobel

Digitally signed by Tamara Strobel  
DN: cn=Tamara Strobel, o=Center for Biological Diversity,  
ou, email=lstrobel@biologicaldiversity.org, c=US  
Date: 2017.10.30 17:01:23 -0400

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

CENTER FOR BIOLOGICAL DIVERSITY *et al.*,

Plaintiffs,

v.

SCOTT PRUITT,  
in his official capacity as Administrator of the  
United States Environmental Protection Agency,

Defendant.

)  
)  
)  
) Case No. 3:17-cv-3239-MMC  
)  
)

) **DECLARATION OF LORI ANN**  
) **BURD IN SUPPORT OF**  
) **PLAINTIFFS' MOTION FOR**  
) **SUMMARY JUDGMENT**  
)  
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)  
)  
)

1 I, Lori Ann Burd, declare as follows:

2 1. I have personal knowledge of the facts and statements contained herein and, if  
3 called as a witness, could and would competently testify thereto. I am the director of the  
4 Environmental Health Program at the Center for Biological Diversity ("the Center"). I have been  
5 directing the Center's Environmental Health Program since 2015.

6 2. The Center's mission is to ensure the preservation, protection, and restoration of  
7 biodiversity, native species, ecosystems, public lands and water, and public health through  
8 science, policy, and law. Based on the understanding that the health and vigor of human societies  
9 and the natural environment are closely linked, the Center is working to protect natural resources  
10 like air to secure a future for animals and plants hovering on the brink of extinction, for the  
11 ecosystems they need to survive, and for the people that interact with, depend on, and cherish  
12 these natural resources. The Environmental Health Program is focused on protecting biodiversity  
13 and human health from toxic substances. I am also a member of the Center.

14 3. In my role at the Center, I am involved in strategic decision making and setting  
15 policy priorities for the work that the Center does to reduce the threats to the environment and  
16 public health from toxic substances, including air pollution.

17 4. The Center's Environmental Health program works to help reduce the threats  
18 posed by air pollution through scientific, legal, and policy mechanisms. The Center has been  
19 involved in a series of cases seeking to enforce the Clean Air Act's requirements that states  
20 develop, and EPA reviews for approval or disapproval, State Implementation Plans ("SIP") to  
21 help achieve the clean air standards set by the National Ambient Air Quality Standards  
22 ("NAAQS"). I strive to represent the interests of our members in areas affected and am  
23 concerned about how the negative air quality is impacting them, their families, and the  
24 environment that they enjoy. I am relieved that the Center works on my and our behalf to enforce  
25 Clean Air Act standards that help reduce the threat of pollution and help better inform the public  
26 of the dangers of air pollution.

27 5. The Center relies upon the Clean Air Act and state implementation plans to help

1 set priorities for the work that we do in order to help inform us of areas that are threatened most  
2 by air pollution. SIPs provide a blueprint for states to help reach compliance and maintain the  
3 NAAQS in order to reduce the dangers posed by pollution. EPA's failure to act on SIPs reduces  
4 the Center's ability to analyze whether those plans could be effective in reaching the  
5 requirements of NAAQS and the Clean Air Act, or whether the states are correctly implementing  
6 the SIPs. These SIPs also include data about emission rates from types of sources of air  
7 pollution which is critical information for the Center to be able to do our work effectively and  
8 efficiently.

9           6. Combating air pollution is an issue that is very important to me because I  
10 understand the health impacts of air pollutants like ozone and I am deeply troubled by the effects  
11 that they have on the environment and human health. I am aware of studies linking ozone to a  
12 range of health impacts, such as respiratory problems, increased incidences of hospitalization and  
13 premature mortality. I have a close friend who suffers from severe asthma. I am further aware  
14 that ozone pollution can also negatively affect the health of wildlife and plant life that I and the  
15 Center's other members appreciate viewing in the outdoors. I am further aware that ozone and its  
16 precursor pollutants can lead to haze and negatively affect my and the Center's other members  
17 experiences in nature and the outdoors, and can lead to broader ecosystem effects by affecting  
18 water quality and nutrient cycles.

19           7. These findings make me deeply concerned about environmental concentrations of  
20 air pollutants like ozone, and I have focused my career on working to reduce threats posed by  
21 contaminants and pollutants on human health and the environment.

22           8. I believe that effective implementation and enforcement of our environmental  
23 laws, such as the Clean Air Act, is essential to protecting the public and our natural resources  
24 against the detrimental impacts of air pollutants like ozone. Thus, I am very concerned that EPA  
25 has failed to act on ozone SIPs for a range of states and localities. Unless EPA acts on making  
26 sure SIPs that are required by the Clean Air Act are in place, it is difficult to accurately assess  
27 how to best prioritize the Center's actions to public health, the environment, and ecosystems.

1           9. EPA's failure to make findings of failure to submit denies me information about  
2 the current status of SIP submittals that I need to prioritize the work of the Environmental Health  
3 program. Also, if EPA makes a finding of failure to submit, it will result in either the state  
4 submitting the SIP or EPA promulgating the Federal Implementation Plan ("FIP"). The submittal  
5 of the SIP or the promulgation of the FIP will provide the Center with information about the  
6 current status of the various states' SIP and what work the Center may do to improve the status  
7 of the SIP. But EPA's failure to make a finding of failure to submit denies the Center this  
8 information and thus prevents the Center from effectively deciding what work the Center will do  
9 to engage in the SIP process in order to attempt to improve the status of the various state SIPs.

10           10. I believe that EPA's failure to act on SIPs, especially in light of the current  
11 scientific understanding of the dangers of ozone, is currently putting human health and the  
12 environment at risk. If EPA acted on getting ozone SIPs in place, I could better understand and  
13 identify approaches for the Center to take action to help ensure a clean and healthy environment  
14 for humans and wildlife and represent the interests of our members in protecting public health  
15 and the environment.

16 I declare under penalty of perjury that the foregoing is true and correct.  
17

18 Dated: October 30, 2017  
19

20                   /s/

21                   \_\_\_\_\_/Lori Ann Burd/\_\_\_\_\_  
22                   Lori Ann Burd  
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**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION**

CENTER FOR BIOLOGICAL DIVERSITY  
*et al.*,

Plaintiffs,

v.

SCOTT PRUITT, in his official capacity as  
the Administrator of the United States  
Environmental Protection Agency,<sup>1</sup>

Defendant.

Case No. 3:16-cv-05492-TEH

**EPA'S MEMORANDUM IN OPPOSITION  
TO PLAINTIFFS' MOTION FOR  
SUMMARY JUDGMENT, AND IN  
SUPPORT OF EPA'S PARTIAL CROSS-  
MOTION FOR SUMMARY JUDGMENT,  
AND [PROPOSED] ORDER**

Date: September 11, 2017

Time: 10:00 a.m.

Place: Courtroom 12, 19th Floor

<sup>1</sup> Pursuant to Fed. R. Civ. P. 25(d), Defendant Gina McCarthy's successor, Scott Pruitt, Administrator of the U.S. Environmental Protection Agency, is automatically substituted as the Defendant in this case.



**NOTICE OF CROSS-MOTION**

Please take notice that on September 11, 2017, at 10:00 a.m. or as soon thereafter as counsel can be heard, Defendant, Scott Pruitt, in his official capacity as Administrator of the United States Environmental Protection Agency (hereinafter, "EPA"), will move this Court, located in Courtroom 12, 19th Floor, United States Court House located at 450 Golden Gate Avenue, San Francisco, California, to grant summary judgment as to remedy and enter EPA's Proposed Order.

**RELIEF REQUESTED**

The relief EPA seeks is denial of Plaintiffs' motion for summary judgment and granting of EPA's partial cross-motion as to remedy and entry of EPA's Proposed Order.

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## ACRONYMS

CAA	Clean Air Act
FIP	Federal implementation plan
NAAQS	National Ambient Air Quality Standards
PM <sub>2.5</sub>	Fine particulate matter
SIP	State implementation plan

Pursuant to Civil L.R. 7-2 and Fed. R. Civ. P. 56(a), Defendant EPA, files this opposition to Plaintiffs Center for Biological Diversity's and Center for Environmental Health's motion for summary judgment (Dkt. No. 33, "Pls.' Br.") and concurrently cross-moves for summary judgment as to remedy.

## **I. INTRODUCTION**

Plaintiffs Center for Biological Diversity and Center for Environmental Health ("Plaintiffs") allege that EPA has failed to perform non-discretionary duties under the Clean Air Act ("CAA"), 42 U.S.C. §§ 7401-7671q, section 110(c)(1), 42 U.S.C. § 7410(c)(1). While Plaintiffs' First Amended Complaint raises five claims, Plaintiffs concede that only three claims (Claims 2, 3, and 4) remain at issue for the purposes of summary judgment.<sup>2</sup>

Claim 2 alleges that EPA has failed to make findings that Pennsylvania, Virginia, and Washington failed to submit an infrastructure State implementation plan ("SIP") addressing the requirements of CAA section 110(a)(2)(D)(i)(I), 42 U.S.C. § 7410(a)(2)(D)(i)(I) (referred to as prongs 1 and 2), and that Illinois, Massachusetts, and Rhode Island failed to submit an infrastructure SIP addressing the requirements of CAA section 110(a)(2)(D)(i), 42 U.S.C. § 7410(a)(2)(D)(i) (prongs 1-4), for the 2012 fine particulate matter, or "PM<sub>2.5</sub>," National Ambient Air Quality Standards ("NAAQS"). First Amended Complaint ("FAC") ¶31 (Dkt. No.

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<sup>2</sup> Plaintiffs concede that their motion does not address Claims 1 and 5 because "EPA is now in compliance with the mandatory duties in those claims." Pls.' Br. at 9. EPA notes that as to Claim 1, as of the case management conference, although EPA had not taken final action of "three rules to address PM<sub>2.5</sub> new source review permitting for the Imperial County Air Pollution Control District ("ICAPCD") submitted by California to EPA," i.e. Rules 204, 206, and 207, EPA had proposed to take final action and noted that if finalized, that would moot the portion of Claim 1 relating to the ICAPCD submissions. Joint Case Mgmt. Stmt. at 4 (Dkt. No. 29); *see* 81 Fed. Reg. 91,895, 91,896 (Dec. 19, 2016). EPA took final action approving Rules 204 and 206 on May 19, 2017. *Final Rule*, 82 Fed. Reg. 27,125 (June 14, 2017). However, EPA did not finalize its proposed limited approval/limited disapproval of Rule 207; instead, on May 19, 2017, EPA signed a proposed rule "to conditionally approve Rule 207." 82 Fed. Reg. 26,885 (June 12, 2017). EPA expects to take final action on that proposal by July 30, 2017.



26).<sup>3</sup> This finding is referred to as a finding of failure to submit. EPA does not dispute that it has not made findings of failure to submit for Illinois, Massachusetts, Pennsylvania, Rhode Island, and Washington for these elements of 42 U.S.C. § 7410(a)(2) as to the 2012 PM<sub>2.5</sub> NAAQS. However, EPA has now received a SIP submittal from Virginia and therefore, Claim 2 is now moot as to that state. Dunham Decl. ¶5. Plaintiffs request that the Court order EPA to sign these findings “by no later than 30 days after the Court issues an order on Plaintiffs’ motion.” Pls.’ Br. at 1. As explained below, the most expeditious schedule under which EPA could sign final rules making these findings for the remaining states is within 90 days of the Court’s order on the pending motions.

Claim 3 alleges that EPA has failed to take final action on an infrastructure SIP revision submitted by New Jersey on or about October 17, 2014, addressing the requirements of 42 U.S.C. § 7410(a)(2)(D)(i)(I) (prongs 1-2) for the 2012 PM<sub>2.5</sub> NAAQS. FAC ¶34. EPA admits that it has not taken final action approving, disapproving, or conditionally approving, in whole or in part, the New Jersey SIP revision. Plaintiffs request that the Court order EPA to sign a final rule taking action on the New Jersey SIP submission “by not later than 12 months after the Court issues an order.” Pls.’ Br. at 2. EPA does not oppose Plaintiffs’ request.

Claim 4 alleges that EPA failed to determine, within six months of the attainment date, if the Logan, Utah-Idaho 2006 PM<sub>2.5</sub> Moderate nonattainment area attained the standard by the attainment date of December 31, 2015, and to “publish notice of such finding by no later than June 30, 2016.” FAC ¶37.<sup>4</sup> EPA admits that it did not, within six months of December 31, 2015, determine if the Logan, Utah-Idaho 2006 PM<sub>2.5</sub> Moderate nonattainment area attained the standard by the attainment date of December 31, 2015. Answer ¶37. However, pursuant to

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<sup>3</sup> The First Amended Complaint also addressed Arkansas, Michigan, Minnesota, and Oklahoma. FAC ¶31. Plaintiffs concede that Claim 2 is “now moot” as to those states. Pls.’ Br. at 5-6; *see also id.* at 9.

<sup>4</sup> Plaintiffs also concede Claim 4 is now moot as to the Nogales, Arizona; Chico, California; Imperial County, California; Sacramento, California; San Francisco Bay Area, California; Liberty-Clairton, Pennsylvania; Knoxville-Sevierville-La Follette, Tennessee; Provo, Utah; and Salt Lake City, Utah Moderate nonattainment areas. Pls.’ Br. at 9.

CAA section 188(d), 42 U.S.C. § 7513(d), upon requests from the States of Idaho and Utah, EPA has proposed to approve two extension of the attainment date for the area to December 31, 2016 and December 31, 2017, respectively.<sup>5</sup> Therefore, *if* EPA takes final action extending the attainment date, EPA will no longer have a mandatory duty to make a determination and thus, Claim 4 will become moot as to the Logan, Utah-Idaho nonattainment area. Plaintiffs request the Court order EPA to make a determination of whether the Logan, Utah-Idaho 2006 PM<sub>2.5</sub> Moderate nonattainment area attained the standard by the attainment date of December 31, 2015 within “30 days after the Court enters an order.” Pls.’ Br. at 23. EPA believes that during the pendency of briefing, this claim will become moot if EPA takes final action on its proposed extensions of the attainment date. The public comment periods closed on July 6, 2017 and July 10, 2017, respectively. 82 Fed. Reg. at 25,992, 26,638. EPA has not yet completed consideration of the comments received, but expects to make a decision by the hearing date set for the pending motions, September 11, 2017. In the alternative, if after reviewing the public comments on its proposed extensions, EPA does not finalize the extensions of the attainment date, EPA respectfully requests that the Court allow it nine months, i.e., until April 13, 2018, to propose and finalize a determination, so that it can evaluate any comments received as well as data and analysis not addressed in its earlier proposed determination.

## II. STATUTORY AND REGULATORY BACKGROUND

### A. National Ambient Air Quality Standards

“The Clean Air Act sets forth a cooperative state-federal scheme for improving the nation’s air quality.” *Vigil v. Leavitt*, 381 F.3d 826, 830 (9th Cir. 2004). In this “cooperative federalism regime[,] . . . the federal agency sets required air quality standards but the state is a primary actor in creating plans to achieve them, followed by potential enforcement at both state and federal levels and by private citizens.” *Comm. for a Better Arvin v. EPA*, 786 F.3d 1169,

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<sup>5</sup> See *Proposed Rule*, 82 Fed. Reg. 25,992 (June 6, 2017) (Utah portion of the Logan, Utah-Idaho Moderate nonattainment area); *Proposed Rule*, 82 Fed. Reg. 26,638 (June 8, 2017) (Idaho portion of the Logan, Utah-Idaho Moderate nonattainment area). As discussed further, *see infra* § IV.C, EPA has not made a decision on finalizing these proposed rules.

1173 (9th Cir. 2015). As part of this scheme, EPA must establish NAAQS that limit concentrations of certain pollutants in the “ambient,” or outdoor air. 42 U.S.C. §§ 7408(a)(1), 7409(a)-(b). These pollutants are generally referred to as “criteria pollutants.” Specifically, EPA is tasked with developing “air quality criteria,” which must reflect the latest scientific knowledge on “all identifiable effects on public health or welfare” that may result from a criteria pollutant’s presence in the ambient air. *Id.* § 7408(a)(2). Based on the air quality criteria, EPA must promulgate “primary” and “secondary” NAAQS to protect against a criteria pollutant’s “adverse” effects on public health and public welfare, respectively. *Id.* § 7409. EPA is required to review air quality criteria and NAAQS at least once every five years. *Id.* § 7409(d). This case relates to the standards for fine particulate matter set in 2006 and 2012.

EPA established the first NAAQS for particulate matter in 1971. *Final Rule*, 36 Fed. Reg. 8186 (Apr 30, 1971). In 1997, EPA established the first standard for fine particulate matter, or “PM<sub>2.5</sub>.” *Final Rule*, 62 Fed. Reg. 38,652 (Jul. 18, 1997). In 2006, EPA reviewed the PM<sub>2.5</sub> NAAQS, retaining the PM<sub>2.5</sub> primary and secondary annual standard and lowering the 24-hour PM<sub>2.5</sub> primary and secondary standards to 35 µg/m<sup>3</sup>. *Final Rule*, 71 Fed. Reg. 61,144, 61,224 (Oct. 17, 2006) (the “2006 PM<sub>2.5</sub> NAAQS”). In 2012, EPA again reviewed the standards, lowering the annual PM<sub>2.5</sub> primary standards to 12.0 µg/m<sup>3</sup> and retaining the annual PM<sub>2.5</sub> secondary standards (the “2012 PM<sub>2.5</sub> NAAQS”) and 24-hour PM<sub>10</sub> 24-hr standards. *Final Rule*, 78 Fed. Reg. 3086, 3277 (Jan. 15, 2013) (codified at 40 C.F.R. § 50.18).

## **B. Area Designations**

After EPA promulgates a new or revised NAAQS, CAA section 107(d)(1) directs the Agency to designate those areas of the nation that are either attaining or not attaining the NAAQS, or are unclassifiable, through an administrative process with the states. 42 U.S.C. § 7407(d)(1). First, each state, within one year of promulgation of a new or revised NAAQS, must submit to EPA a list identifying the state’s initial recommended designations for all areas within the state. *Id.* § 7407(d)(1)(A). The CAA establishes three designations that states may recommend:

- “nonattainment”: areas that do not meet the NAAQS, and areas that contribute to a violation of the NAAQS in a nearby area;
- “attainment”: areas that meet the NAAQS; and
- “unclassifiable”: areas in which available information is insufficient to determine whether the NAAQS is met.

*Id.* §§ 7407(d)(1)(A)(i)-(iii).

Next, EPA must promulgate designations in response to the states’ recommended designations as expeditiously as practicable, but in no case more than two years from setting the new or revised NAAQS. *Id.* § 7407(d)(1)(B)(i). This period may be extended for up to one year (as was the case here) in the event EPA determines it lacks sufficient information to promulgate the designations. *Id.* On November 13, 2009, pursuant to 42 U.S.C. § 7407(d), EPA promulgated initial designations identifying areas that violate the 2006 PM<sub>2.5</sub> NAAQS. *Final Rule*, 74 Fed. Reg. 58,688 (effective December 14, 2009). EPA promulgated additional designations in 2011. *Final Rule*, 76 Fed. Reg. 6056 (Feb. 3, 2011) (effective Mar. 7, 2011). EPA established air quality designations for the 2012 PM<sub>2.5</sub> NAAQS in 2014 and 2015. *Final Rule*, 80 Fed. Reg. 2206 (Jan. 15, 2015); *Final Rule*, 80 Fed. Reg. 18,535 (Apr. 7, 2015) (effective Apr. 15, 2015).

### C. The Clean Air Act’s State Implementation Plans

States have primary responsibility for ensuring that their air quality meets the NAAQS. 42 U.S.C. § 7407(a). A state’s duties in implementing a NAAQS in an area varies depending upon the designation of the areas within the state. As long as an area remains undesignated, or is designated “attainment” or “unclassifiable,” the state’s duties are limited to developing a “state implementation plan” (“SIP”) that provides for basic implementation, maintenance, and enforcement of the new or revised NAAQS in each air quality control region within the state. 42 U.S.C. §§ 7410(a)(1)-(2). These SIPs are commonly called “infrastructure SIPs,” and are

1 required to be submitted no later than three years after promulgation of a new or revised  
 2 NAAQS for all areas regardless of such areas' designation status. *Id.* § 7410(a)(1).<sup>6</sup>

3 Section 110(a)(2) lists specific elements that states must meet, as applicable, in their  
 4 general infrastructure SIP submissions. *Id.* § 7410(a)(2). The requirements include basic SIP  
 5 infrastructure elements such as provisions to provide for monitoring, enforcement, and general  
 6 legal authority, which are designed to assure attainment and maintenance of the NAAQS.

7 Pertinent to this case, SIPs must contain adequate provisions:

8 (i) prohibiting . . . any source or other type of emissions activity within the State from  
 9 emitting any air pollutant in amounts which will--

10 (I) contribute significantly to nonattainment in [referred to as prong 1], or  
 11 interfere with maintenance by [prong 2], any other State with respect to any such  
 12 national primary or secondary ambient air quality standard, or

13 (II) interfere with measures required to be included in the applicable  
 14 implementation plan for any other State under part C . . . to prevent significant  
 15 deterioration of air quality [prong 3] or to protect visibility [prong 4].

16 *Id.* § 7410(a)(2)(D)(i).

17 However, if an area is designated “nonattainment,” additional planning requirements  
 18 become applicable. In the case of PM<sub>2.5</sub> nonattainment areas, states must adopt, and submit for  
 19 EPA approval, SIPs showing how the area will be brought into attainment with the NAAQS as  
 20 expeditiously as practicable, but no later than five years from the date of “nonattainment”  
 21 designation, under CAA sections 172 and 191-192, 42 U.S.C. §§ 7502, 7514-7514a. In  
 22 addition, upon designation as “nonattainment,” stricter new source review permitting  
 23 requirements are triggered, in lieu of the prevention of significant deterioration permitting  
 24

25 \_\_\_\_\_  
 26 <sup>6</sup> For areas that do not attain the NAAQS, states must also submit nonattainment SIPs designed  
 27 to help states meet the NAAQS. Based on the severity of an area's particulate matter air quality  
 28 problem, the Act specifies different dates by which states are to bring areas into attainment with  
 the particulate matter NAAQS.

provisions applicable in undesignated, “attainment,” and “unclassifiable” areas. *Id.* §§ 7502(c)(5), 7503.

**D. EPA Review of SIP Submissions and Promulgation of Federal Implementation Plans**

CAA section 110(k) sets forth procedural mechanisms relating to SIP submissions or revisions. 42 U.S.C. § 7410(k). EPA must determine no later than six months after the date by which a state is required to submit a SIP whether the state has made a submission that meets minimum completeness criteria. *Id.* § 7410(k)(1)(B). If EPA does not determine completeness of the plan or revision within six months, then the submittal is deemed complete by operation of law. *Id.* Pursuant to CAA section 110(k)(2)-(4), EPA must approve, disapprove, or conditionally approve, in whole or in part, each plan or revision, within 12 months of a determination of completeness by EPA or by operation of law. *Id.* §§ 7410(k)(2)-(4).

**E. Failure to Attain Standard by Relevant Attainment Date and Reclassification Upon Failure to Attain**

Pursuant to CAA section 188(b)(2), 42 U.S.C. § 7513(b)(2), EPA is required to determine whether a nonattainment area attained the standard by the relevant nonattainment date within six months following the applicable attainment date. Areas designated as Moderate nonattainment for the 2012 PM<sub>2.5</sub> NAAQS must come into attainment no later than the end of the sixth calendar year following designation as nonattainment. 42 U.S.C. § 7513(c)(1). Upon application by any state, EPA may extend the attainment date by one year if the state “has complied with all requirements and commitments pertaining to the area in the applicable implementation plan” and no “more than one exceedance of the 24-hour national ambient air quality standard level for [PM<sub>2.5</sub>] has occurred in the area in the year preceding the Extension Year, and the annual mean concentration of [PM<sub>2.5</sub>] in the area for such year is less than or

equal to the standard level.”<sup>7</sup> *Id.* § 7513(d)(2). The additional year is an “Extension Year.” *Id.*  
No more than two one-year extensions may be granted for a nonattainment area. *Id.*

#### IV. LEGAL STANDARDS

##### A. Subject Matter Jurisdiction

Federal courts have limited jurisdiction and can hear only those cases specifically authorized by the U.S. Constitution or by statute. *See Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). Where, as here, the United States or its agencies have been sued, an express and unambiguous waiver of sovereign immunity is a prerequisite for subject matter jurisdiction. *See Lane v. Pena*, 518 U.S. 187, 192 (1996). Even when a statute provides an express waiver of sovereign immunity, that waiver is strictly construed in favor of the government. *See United States v. Nordic Village, Inc.*, 503 U.S. 30, 34 (1992); *United States Dep’t of Energy v. Ohio*, 503 U.S. 607, 615 (1992) (quoting *McMahon v. United States*, 342 U.S. 25, 27 (1951)).

Section 304(d) of the CAA limits the Court’s jurisdiction in this matter to an “alleged . . . failure of the Administrator to perform any act or duty . . . which is not discretionary with the Administrator.” 42 U.S.C. § 7604(a)(2). In a challenge to subject matter jurisdiction, the burden of establishing jurisdiction falls on the plaintiff. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992); *United States v. Sherwood*, 312 U.S. 584, 587-88 (1941). Where subject matter jurisdiction does not exist, “the court cannot proceed at all in any cause.” *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 94 (1998). Thus, if there is no non-discretionary duty, the Court must dismiss the claim for lack of jurisdiction. *Sierra Club v. Whitman*, 268 F.3d 898, 901 (9th Cir. 2001).

##### B. Remedy for Failure to Meet Statutory Deadline

Where, as here, EPA does not dispute that it has not taken certain actions mandated under the CAA statute, the only dispute remaining concerns the length of time EPA should be

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<sup>7</sup> *See Natural Res. Def. Council v. EPA*, 706 F.3d 428 (D.C. Cir. 2013) (holding that in addition to the general Subpart 1 requirements the requirements of Subpart 4 also apply to the regulation of PM<sub>2.5</sub>, i.e., 42 U.S.C. §§ 7513, 7513a, & 7513b).

1 given to perform these obligations. Courts adjudicating similar disputes concerning the remedy  
 2 for an agency's failure to meet a statutory deadline commonly resolve such disputes through  
 3 summary judgment. *See, e.g., Sierra Club v. McCarthy*, No. 14-cv-5091, 2015 WL 3666419, at  
 4 \*3 (N.D. Cal. May 7, 2015); *Sierra Club v. Johnson*, 444 F. Supp. 2d 46, 52 (D.D.C. 2006)  
 5 ("Because defendant does not contest the issue of liability, the entry of summary judgment is  
 6 appropriate, and it remains only for the Court to fashion an appropriate equitable remedy.")  
 7 (citing cases). The Court may properly enter an order setting a deadline for EPA to perform an  
 8 obligation for which it admits liability. *See Nat. Res. Def. Council, Inc. v. Train*, 510 F.2d 692,  
 9 713 (D.C. Cir. 1974).

10 A district court has broad discretion to fashion equitable remedies. *Weinberger v.*  
 11 *Romero-Barcelo*, 456 U.S. 305, 311-13 (1982); *Am. Lung Ass'n v. Browner*, 884 F. Supp. 345,  
 12 347 (D. Ariz. 1994); *see also Env'tl. Def. Fund v. Thomas*, 627 F. Supp. 566, 569-70 (D.D.C.  
 13 1986) (adopting compliance schedule proposed by EPA in a case where the Agency had failed  
 14 to comply with a nondiscretionary statutory duty, after finding that EPA's proposed schedule  
 15 was "reasonable"); *Sierra Club v. Johnson*, 444 F. Supp. 2d at 58 (focusing on amount of time  
 16 "necessary for the promulgation of workable regulations").

17 In a suit alleging violation of a Congressionally mandated duty, courts have recognized  
 18 circumstances that can make it infeasible for an agency to comply with a particular deadline:  
 19 (1) the "budgetary" and "manpower demands" required are "beyond the agency's capacity or  
 20 would unduly jeopardize the implementation of other essential programs," and (2) an agency's  
 21 need to have more time to sufficiently evaluate complex technical issues. *Train*, 510 F.2d at  
 22 712-13. When an agency concludes that such constraints require an extension of the deadline, it  
 23 may so demonstrate to the district court. *Id.* at 713. In *Train*, the D.C. Circuit reasoned that a  
 24 federal court may exercise its equitable discretion to extend a deadline if the agency has "in  
 25 good faith employed the utmost diligence in discharging [its] statutory responsibilities." *Id.* In  
 26 short, when an agency has missed a statutory deadline, the court should examine the relevant  
 27 facts and circumstances and evaluate the time needed by the agency to take action.



### 1 C. Mootness

2 “It has long been settled that a federal court has no authority ‘to give opinions upon  
3 moot questions or abstract propositions, or to declare principles or rules of law which cannot  
4 affect the matter in issue in the case before it.’” *Church of Scientology of Cal. v. United States*,  
5 506 U.S. 9, 12 (1992) (quoting *Mills v. Green*, 159 U.S. 651, 653 (1895)); *see also Friends of*  
6 *the Earth, Inc. v. Bergland*, 576 F.2d 1377, 1379 (9th Cir. 1978) (“Where the activities sought  
7 to be enjoined have already occurred, and the appellate courts cannot undo what has already  
8 been done, the action is moot.”). Accordingly, courts must dismiss a properly-brought case or  
9 claim if it is subsequently rendered moot. *Honeywell Int’l, Inc. v. Nuclear Regulatory Comm’n*,  
10 628 F.3d 568, 576 (D.C. Cir. 2010).

## 11 IV. ARGUMENT

### 12 A. Claim 2: Findings of Failure to Submit

13 Pursuant to CAA section 110(a)(1), 42 U.S.C. § 7410(a)(1), the deadline for States to  
14 submit infrastructure SIPs to EPA for the 2012 PM<sub>2.5</sub> NAAQS was January 15, 2016 (three  
15 years after the date of promulgation of the standards). 78 Fed. Reg. at 3086. Plaintiffs allege  
16 that EPA has a mandatory duty to make a finding that the six states listed below have failed to  
17 submit a SIP addressing the noted requirements of CAA section 110(a)(2), 42 U.S.C.  
18 § 7410(a)(2), for the 2012 PM<sub>2.5</sub> NAAQS within six months of the date such SIPs were  
19 required:

20 STATE	ELEMENT(S)
21 Illinois	110(a)(2)(D)(i) (prongs 1-4)
22 Massachusetts	110(a)(2)(D)(i) (prongs 1-4)
23 Pennsylvania	110(a)(2)(D)(i)(I) (prongs 1-2)
24 Rhode Island	110(a)(2)(D)(i) (prongs 1-4)
25 Virginia	110(a)(2)(D)(i)(I) (prongs 1-2)
26 Washington	110(a)(2)(D)(i)(I) (prongs 1-2)

On May 16, 2017, Virginia submitted a SIP submission addressing the requirements of CAA section 110(a)(2)(D)(i)(I), 42 U.S.C. § 7410(a)(2)(D)(i)(I) (prongs 1-2) for the 2012 PM<sub>2.5</sub> NAAQS. Pursuant to CAA section 110(k)(1)(B), 42 U.S.C. § 7410(k)(1)(B), EPA found Virginia's SIP submission to be complete on May 31, 2017. *See* Dunham Decl. ¶5. Therefore, EPA no longer has a mandatory duty to find that Virginia failed to submit a SIP revision addressing the requirements of CAA section 110(a)(2)(D)(i)(I), 42 U.S.C. § 7410(a)(2)(D)(i)(I) (prongs 1-2), for the 2012 PM<sub>2.5</sub> NAAQS. Claim 2 is moot as to Virginia.

As of July 13, 2017, EPA had not yet found that Illinois, Massachusetts, and Rhode Island have failed to submit infrastructure SIPs addressing the requirements of CAA section 110(a)(2)(D)(i), 42 U.S.C. § 7410(a)(2)(D)(i) (prongs 1-4), and that Pennsylvania and Washington have failed to submit infrastructure SIPs addressing the requirements of CAA section 110(a)(2)(D)(i)(I), 42 U.S.C. § 7410(a)(2)(D)(i)(I) (prongs 1-2), for the 2012 PM<sub>2.5</sub> NAAQS. Answer ¶¶34-35 (ECF No. 28). The only dispute between the parties concerns the length of time EPA should be given to perform its obligations. Plaintiffs request that the Court order EPA to sign these findings "by no later than 30 days after the Court issues an order on Plaintiffs' motion." Pls.' Br. at 1. As explained below and in the supporting Dunham Declaration, the most expeditious schedule under which EPA could sign final rules making these findings for the remaining states is within 90 days after the Court's order. The Court may properly enter an order setting deadlines for EPA to perform an obligation for which it admits liability. *See Nat. Res. Def. Council, Inc. v. Train*, 510 F.2d at 713. In exercising its discretion to establish appropriate deadlines, this Court should consider the Agency's budgetary and manpower constraints, the importance of not jeopardizing EPA's implementation of other mandatory duties, and EPA's many competing obligations.

As the Dunham Declaration explains in detail, many steps are required to develop and sign a "finding of failure to submit" notice for *Federal Register* publication by the Office of the Federal Register at the National Archives and Records Administration. Acting Assistant Administrator Dunham's description of the administrative steps in the process and the time needed for those steps in consideration of the Agency's other competing obligations,

1 including those required by court order, consent decree, or settlement agreements. Dunham  
 2 Decl. ¶¶13-31. EPA believes that 90 days from the date of this Court's order is the most  
 3 expeditious schedule that the Agency can reasonably meet under the circumstances. *Id.* ¶32.

4 As detailed in the Dunham Declaration, the following steps are required to issue a  
 5 finding of failure to submit. Dunham Decl. ¶¶14-24. The first step is information gathering  
 6 and verification. EPA staff verify the facts related to the status of each State's SIP submission  
 7 (or lack thereof) to ensure that a state has not made a submission addressing the relevant  
 8 provisions of CAA section 110(a)(2), 42 U.S.C. § 7410(a)(2). *Id.* ¶14. Here, EPA expects  
 9 that it will take action as to the five states in a consolidated rulemaking at headquarters rather  
 10 than individual actions on different schedules at the Regional Offices. *Id.* ¶9. As a result, the  
 11 project lead will be verifying the facts for each of the five states.

12 After verifying the facts, EPA staff drafts the *Federal Register* notice. The draft is  
 13 circulated for review by other Agency staff with expertise in the particular area and type of  
 14 notice and coordinates with the affected EPA Regional Office to discuss any instructions,  
 15 information, or questions, such as the schedule for making the findings or details concerning  
 16 the substantive treatment of particular components of section 110(a)(2)(D)(i)(I). *Id.* ¶¶15-17.

17 EPA staff then finalizes the complete *Federal Register* package and reconfirms the  
 18 status of the relevant states' submissions to ensure that nothing has changed. This is  
 19 important because as a practical matter, EPA's preparation to issue a finding of failure to  
 20 submit sometimes causes an affected State to promptly make the required SIP submission.  
 21 *Id.* ¶18. After confirming, EPA staff incorporates any edits into the draft *Federal Register*  
 22 notice package and requests internal review by administrative staff to ensure that the notice  
 23 conforms to the requirements for publication in the *Federal Register*. It is not uncommon for  
 24 the Office of the Federal Register to return signed notices to EPA to resolve issues relating to  
 25 the Office's formatting or editorial requirements. *Id.* ¶19. The step helps avoid unnecessary  
 26 delay between transmission of the notice to the Office of the Federal Register and publication.  
 27 *Id.* Further, the draft notice is reviewed by supervisor staff and legal counsel. *Id.* ¶¶20-23.

1 EPA staff also prepare additional documentation, such as the transmission documentation, the  
 2 action memorandum, a communication plan, and a fact sheet. *Id.* ¶22.

3 The draft notice along with this additional documentation is then routed for review and  
 4 signature by the Acting Assistant Administrator of Office of Air and Radiation, Ms. Dunham.  
 5 *Id.* ¶24. Although verification of information, preparation and review of the draft notice, and  
 6 signature on the final *Federal Register* notice alone takes approximately 30 business days,  
 7 imposing such a schedule assumes that EPA could prioritize this action over other mandatory  
 8 Agency obligations. That is not reality. Indeed, EPA's Office of Air and Radiation as well as  
 9 EPA's Regional Offices are burdened by many other mandatory actions, both statutory and  
 10 pursuant to other court-ordered deadlines, which impact the resources available to make these  
 11 "good neighbor" findings of failure to submit for the 2012 PM<sub>2.5</sub> NAAQS. *See Dunham Decl.*  
 12 ¶¶25-31. Accordingly, the EPA requests 90 days from the date of the Court's order to issue  
 13 findings of failure to submit for the relevant states.

14 Meeting all mandatory duties imposed by the CAA with limited resources requires  
 15 EPA to make choices about the prioritization and scheduling of its work. As Acting Assistant  
 16 Administrator Dunham explains:

17 In determining the allocation of resources and the prioritization of particular  
 18 projects, [the Office of Air and Radiation staff] looks at several factors,  
 19 including: (1) whether or not a project must be completed by a time certain;  
 20 (2) the environmental and public health impact of proceeding with a  
 21 particular project compared to other projects; and (3) the amount of resources  
 22 that would be needed to complete a particular project. With respect to the  
 23 prioritization of the actions at issue in this litigation, EPA must necessarily  
 24 weigh the importance of other actions underway at the present time.

25 *Id.* ¶27.

26 The number and wide scope of the air program's activities is reflected in the Agency's  
 27 semiannual regulatory agenda, published in the Federal Register to provide public notice of  
 28 EPA's significant upcoming regulatory actions including regulations currently under  
 development and reviews of existing regulations. *Id.* ¶¶28-29; *see Fall 2016 Regulatory*

1 *Agenda*, 81 Fed. Reg. 94,810 (Dec. 23, 2016).<sup>8</sup> Further, significant air program resources are  
 2 currently committed to projects pursuant to either consent decrees or settlement agreements.  
 3 Dunham Decl. ¶30. These obligations require a substantial commitment of the air program's  
 4 resources and have been taken into account in EPA's proposed schedule for issuing the  
 5 remaining findings of failure to submit. *Id.* ¶31.

6 Plaintiffs also request that the Court order EPA to transmit signed rules to the Office  
 7 of the Federal Register within three business days. Pls.' Br. at 21. First, the Court need not  
 8 set such an interim deadline for EPA. As explained in the Dunham Declaration, EPA has a  
 9 process for notice preparation and transmission of final rulemaking packages to the Office of  
 10 the Federal Register for publication designed to ensure prompt receipt by the OFR. Second,  
 11 as explained in the Dunham Declaration, EPA needs a minimum of 15 business days to  
 12 transmit signed rules to the Office of the Federal Register because there are a number of  
 13 procedural steps EPA's Office of Policy must complete to prepare the signed rule for  
 14 publication. *Id.* ¶¶32-36.

15 In sum, the Court should find that allowing EPA 90 days to sign a notice making the  
 16 findings of failure to submit within 90 days represents a reasonable and expeditious timetable  
 17 for Agency action under the circumstances. As noted above, this remedy is not significantly  
 18 different from that requested by Plaintiffs. If the Court deems it necessary, it should order EPA  
 19 to transmit the final rulemaking package to the Office of the Federal Register within 15 business  
 20 days of signing the rule.

### 21 **B. Claim 3: Final Action on New Jersey's SIP Submission**

22 On or about October 17, 2014, the State of New Jersey submitted a revision to its SIP  
 23 addressing the requirements of, *inter alia*, CAA section 110(a)(2)(D)(i)(I), 42 U.S.C.  
 24 § 7410(a)(2)(D)(i)(I) (prongs 1-2), for the 2012 PM<sub>2.5</sub> NAAQS. EPA deemed that SIP revision  
 25 administratively complete on October 28, 2014. EPA has not yet taken final action, pursuant to

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26  
 27 <sup>8</sup> Additional information and a more complete listing of the air program projects in the  
 28 Regulatory Agenda Database, provided at <http://www.reginfo.gov/public/do/eAgendaMain>.  
 Dunham Decl. ¶28.

CAA sections 110(k)(3)-(4), 42 U.S.C. §§ 7410(k)(3)-(4), to approve, disapprove, or conditionally approve, in whole or in part, that SIP revision to the extent it addresses the requirements of CAA section 110(a)(2)(D)(i)(I), 42 U.S.C. § 7410(a)(2)(D)(i)(I), for the 2012 PM<sub>2.5</sub> NAAQS. Answer ¶35. Plaintiffs request that the Court order EPA to take final action on the submittal within “12 months after the Court issues an order.” Pls.’ Br. at 22. As noted above, EPA does not dispute Plaintiffs’ proposed remedy.

However, as with the findings of failure to submit discussed above, EPA does not agree with Plaintiffs’ assertion that 3 business days is sufficient time for it to transmit signed rules to the Office of the Federal Register for publication. *See supra* § IV.A. For the same reasons, EPA respectfully requests that if the Court finds it necessary to set a deadline for transmission of signed rules to the Office of the Federal Register for publication, it allow EPA 15 business days to do so.

#### **C. Claim 4: Determination of Attainment or Nonattainment**

Pursuant to CAA section 107(d), 42 U.S.C. § 7407(d), EPA determines whether each air quality control region is in attainment, nonattainment, or is unclassifiable for each NAAQS. On November 13, 2009, EPA promulgated initial designations identifying areas that are not in attainment of the 2006 24-hour PM<sub>2.5</sub> NAAQS. *Final Rule*, 74 Fed. Reg. 58,688 (effective Dec. 14, 2009). On November 13, 2009, EPA designated the Logan, Utah-Idaho area as nonattainment. This area includes a portion of Franklin County, Idaho, and a portion of Cache County, Utah. 74 Fed. Reg. at 58,724 (designating part of Franklin County, Idaho) (codified at 40 C.F.R. § 81.313); 74 Fed. Reg. at 58,769 (designating part of Cache County, Utah) (codified at 40 C.F.R. § 81.345). Pursuant to CAA section 188(c)(1), 42 U.S.C. § 7513(c)(1), the attainment date for 2006 PM<sub>2.5</sub> Moderate nonattainment areas is the end of the sixth calendar year after designation, i.e., by December 31, 2015. Pursuant to CAA section 188(b)(2), 42 U.S.C. § 7513(b)(2), EPA is required to determine whether Moderate nonattainment areas have attained the standard by the attainment date within six months following the attainment date, i.e., by June 30, 2016.

On December 1, 2016, EPA proposed to find that the Logan, Utah-Idaho Moderate nonattainment area failed to attain the 2006 24-hour PM<sub>2.5</sub> NAAQS by December 31, 2015. *Proposed Rule*, 81 Fed. Reg. 91,088, 91,089 (Dec. 16, 2016). However, EPA did not finalize that proposed determination. *Final Rule*, 82 Fed. Reg. 21,711, 21,711-13 (May 10, 2017). Instead, EPA proposed, upon requests from Idaho and Utah, to grant the States' request for two extension years, extending the attainment date to December 31, 2017. 82 Fed. Reg. at 25,992, 26,638.

Plaintiffs request that the Court order EPA to make a determination of whether the Logan, Utah-Idaho 2006 PM<sub>2.5</sub> Moderate nonattainment area attained the standard by the attainment date of December 31, 2015 within "30 days after the Court enters an order." Pls.' Br. at 23. As explained below, if EPA finalizes the proposed actions extending the attainment date to December 31, 2017, then this claim will become moot during the pendency of briefing.<sup>9</sup> However, because that rulemaking is on-going, EPA requests that, if the claim does not become moot, the Court should allow it nine months to alternatively make a final determination of whether or not the Logan, Utah-Idaho area attained the standard by the attainment date, allowing time for EPA to consider additional data and analysis received as part of Utah's request for extensions.

In its final rule making attainment and nonattainment determinations as other areas initially at issue in this case,<sup>10</sup> EPA noted that "[s]ince the issuance of the December 2016 proposed action, the state of Utah has provided additional information for the monitoring sites in the Logan, Utah-Idaho, area." 82 Fed. Reg. at 21,712, at n.4. EPA also received a comment from the Idaho Department of Environmental Quality opposing EPA's determination not to grant the 1-year extension and subsequent determination that the Logan, Utah-Idaho,

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<sup>9</sup> To the extent Plaintiffs are displeased with EPA's proposal to grant Idaho's and Utah's requests for two extension years to extend the attainment date to December 31, 2017, *see* Pls.' Br. at 28, they may seek review of any future final action that would stem from the proposal. However, that challenge would be reviewable only in the courts of appeal. 42 U.S.C. § 7607(b)(1).

<sup>10</sup> *See infra* at 1 n.2; *Final Rule*, 82 Fed. Reg. 21,711 (May 10, 2017).

1 nonattainment area failed to attain by the December 31, 2015, attainment date. 82 Fed. Reg. at  
 2 21,713. EPA is considering the information and comments provided by Utah and Idaho, and  
 3 therefore, did not take final action on the Logan, Utah-Idaho, Moderate nonattainment area. *Id.*  
 4 at 21,712, at n.4 and 21,713.

5 Instead, on May 25, 2017, pursuant to CAA section 188(d), 42 U.S.C. § 7513(d), EPA  
 6 proposed to approve Utah's request for two one-year extensions of the deadline for the Utah  
 7 portion of the Logan, Utah-Idaho Moderate nonattainment area to attain the 2006 PM<sub>2.5</sub>  
 8 standards from December 31, 2015 to December 31, 2016 and December 31, 2017, respectively.  
 9 *Proposed Rule*, 82 Fed. Reg. 25,992 (June 6, 2017). On June 1, 2017, EPA issued a similar  
 10 proposal to approve Idaho's requests for two one-year extensions of the deadline for the Idaho  
 11 portion of the Logan, Utah-Idaho Moderate nonattainment area to attain the 2006 PM<sub>2.5</sub>  
 12 standards from December 31, 2015 to December 31, 2016 and December 31, 2017, respectively.  
 13 *Proposed Rule*, 82 Fed. Reg. 26,638 (June 8, 2017).

14 If these two proposed actions are finalized, Claim 4, as to the Logan Utah-Idaho  
 15 nonattainment area will then become moot because the relevant attainment date for the Logan,  
 16 Utah-Idaho Moderate nonattainment area will be December 31, 2017. Pursuant to CAA  
 17 section 188(b)(2), 42 U.S.C. § 7513(b)(2), EPA would then have six months to make a  
 18 determination whether the area has attained the standard, i.e., until June 30, 2018. Because the  
 19 public comment periods for the proposed rules close on July 6, 2017 and July 10, 2017,  
 20 respectively, EPA has just begun the process of reviewing the public comments. *See* 82 Fed.  
 21 Reg. at 25,992; 82 Fed. Reg. at 26,638. In the event that EPA does not take a final action that  
 22 moots this claim during the pendency of briefing, EPA respectfully requests that the Court  
 23 allow nine months to, if necessary, consider any new information received in response to the  
 24 proposed rule extending the area's attainment date and make a determination regarding the  
 25 area's attainment. Dunham Decl. ¶¶37-67. Although EPA previously proposed to determine  
 26 that the Logan, Utah-Idaho area failed to attain the standard, that determination was in part  
 27 based upon incomplete data submitted to EPA for the Utah portion of the nonattainment area.  
 28 81 Fed. Reg. at 91,088. Though Idaho argued that the data for the relevant air quality monitor



1 in the Idaho portion supported extending the attainment date, EPA reasoned that “the  
 2 nonattainment area *as a whole* lacks the necessary data for the EPA to determine that the air  
 3 quality criterion has been satisfied for the entire nonattainment area.” *Id.* at 91,092. Since that  
 4 time, Utah has submitted additional data and an analysis to address the incomplete data. EPA’s  
 5 proposal to now grant extensions of the attainment date is based upon this new data. 82 Fed.  
 6 Reg. at 25,993. However, if EPA does not finalize the extensions and instead has to reconsider  
 7 whether the area attained the standard, it will need to consider that additional data and analysis  
 8 and might be required to issue a new proposed rule. Dunham Decl. ¶39. As a result, EPA will  
 9 require up to nine months, i.e., until April 13, 2018, in order to issue a new proposal supporting  
 10 its conclusion on whether the Logan, Utah-Idaho area met the standard by the original  
 11 December 31, 2015 attainment in light of the additional data. *Id.* ¶¶37-67.

## 12 VI. CONCLUSION

13 For the reasons explained above and in the Dunham Declaration, the Court should allow  
 14 EPA 90 days to make findings that Illinois, Massachusetts, and Rhode Island have failed to  
 15 submit infrastructure SIPs addressing the requirements of CAA section 110(a)(2)(D)(i),  
 16 42 U.S.C. § 7410(a)(2)(D)(i) (prongs 1-4), and that Pennsylvania and Washington have failed to  
 17 submit infrastructure SIPs addressing the requirements of CAA section 110(a)(2)(D)(i)(I),  
 18 42 U.S.C. § 7410(a)(2)(D)(i)(I) (prongs 1-2), for the 2012 PM<sub>2.5</sub> NAAQS. The Court should  
 19 grant Plaintiffs’ request to allow EPA 12 months to take final actions approving, disapproving,  
 20 or conditionally approving, in whole or in part, the New Jersey SIP revision addressing the  
 21 CAA section 110(a)(2)(D)(i)(I), 42 U.S.C. § 7410(a)(2)(D)(i)(I), for the 2012 PM<sub>2.5</sub> NAAQS.  
 22 Lastly, if EPA does not take final action extending the attainment date for the Logan, Utah-  
 23 Idaho nonattainment area to December 31, 2017, thereby mooting this claim, the Court should  
 24 allow EPA nine months to make a determination of whether or not the area has attained the  
 25 NAAQS or must be reclassified. Further, if the Court deems it necessary to set a deadline for  
 26 EPA to transmit the final rules to the Office of the Federal Register for publication, EPA  
 27 requests that it allow EPA 15 business days after signature.

28 //

1 Respectfully submitted,

2 Date: July 13, 2017

3 JEFFREY H. WOOD  
4 Acting Assistant Attorney General  
5 Environment and Natural Resources Division

6 /s/ Leslie M. Hill

7 LESLIE M. HILL (D.C. Bar No. 476008)  
8 U.S. Department of Justice  
9 Environment & Natural Resources Division  
10 Environmental Defense Section  
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16 *Attorneys for Defendant*

17 Of Counsel:

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19 Office of General Counsel  
20 United States Environmental Protection Agency  
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**UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
OAKLAND DIVISION**

CENTER FOR BIOLOGICAL DIVERSITY, and

CENTER FOR ENVIRONMENTAL HEALTH,

Plaintiffs,

V.

SCOTT PRUITT,

in his official capacity as Administrator of the  
United States Environmental Protection Agency,

Defendant.

Case No. 3:16-cv-5492-TEH

DECLARATION OF DAVID  
HOWEKAMP IN SUPPORT OF  
PLAINTIFFS' MOTION FOR  
SUMMARY JUDGMENT

1 I, DAVID P. HOWEKAMP, declare as follows:

2 1. I am an environmental consultant specializing in air quality management. In my  
3 practice I have provided expert advice to companies, governmental agencies, nongovernmental  
4 organizations and citizen groups. Much of my practice involves complex issues regarding  
5 stationary and mobile sources of ozone. I have also provided expert advice to organizations  
6 regarding appropriate rulemaking schedules for Clean Air Act requirements contested in Federal  
7 District Court. I have a Master's Degree in Business Administration and a Bachelor's Degree in  
8 Mechanical Engineering from the University of California at Berkeley. My CV is attached  
hereto as Attachment A.

9 2. Prior to becoming an environmental consultant in April 2000, I was a career  
10 employee at the U.S. Environmental Protection Agency for 31 years. From 1982 to 2000, I was  
11 the Director of the Air Division for EPA's Region 9 office in San Francisco. In this position I  
12 was the principal advisor to the Regional Administrator on policy, political and technical issues  
13 involving air quality management. I managed a budget of over \$40 million and directed a staff  
14 of 120 scientists, engineers and planners in implementing the requirements of the Clean Air Act  
(CAA).

15 3. I have significant experience interpreting, implementing and enforcing provisions  
16 of the CAA and I am intimately familiar with EPA's policies, interpretations and regulations  
17 regarding the CAA. I also have extensive experience in establishing or negotiating rulemaking  
18 schedules since most of the rulemakings produced by my division were performed as a result of  
court orders or settlement agreements.

19 4. In my capacity as Director of the Region 9 Air Division, I was personally  
20 responsible for the preparation of Federal Register (FR) notices making findings of failure to  
21 submit all or a portion of a state implementation plan (SIP) required by the CAA, so I have  
22 first-hand knowledge of the technical and policy considerations in such matters and the  
management demands and resource requirements for producing these notices.

23 5. In my opinion, assuming a court were to order EPA to make a finding that certain

1 states have failed to submit parts of the Infrastructure SIPs for the 2012 particulate matter less  
 2 than 2.5 microns in diameter (PM<sub>2.5</sub>) National Ambient Air Quality Standard (NAAQS), EPA  
 3 could complete and sign a Federal Register notice making such a finding within 30 days.

4 6. Such a timetable is reasonable for the following reasons:

- 5 • EPA has known since July 1, 2016 that the Plaintiffs intended to sue to enforce the  
 6 agency's mandatory duty to make a finding that certain states have failed to submit parts  
 7 of the Good Neighbor provisions of Infrastructure SIPs for the 2012 PM<sub>2.5</sub> NAAQS.  
 8 Because the duty is nondiscretionary, EPA should have used the past 11 months to  
 9 conduct the efforts needed to comply with the requirement, knowing the only question to  
 10 be decided by the court is the exact schedule for completion of the task. In addition,  
 11 there will be an additional period between a motion for summary judgment by the  
 12 plaintiffs and a court order from the court. This will provide even more time for the  
 13 agency to complete preparation of the finding.
- 14 • The agency will not be plowing new ground in making this finding. Over the more than  
 15 twenty years of implementing the Clean Air Act Amendments of 1990, EPA has made  
 16 multitudinous findings of failure to submit SIPs. Consequently, the previous findings in  
 17 the form of previously published Federal Register notices provide a well proven template  
 18 for rapidly creating, signing and publishing the required finding. Very little new writing  
 19 will be required in that a new Federal Register notice can easily be created by inserting  
 20 the pertinent requirements and information in this template.
- 21 • No technical or policy analysis is required to make this finding. It is a straightforward  
 22 determination: the states have either submitted or not submitted the required SIPs.  
 23 Furthermore, the agency has established a thorough tracking system to monitor the status  
 of the SIP submittals. The details of this tracking system are displayed at  
[https://www3.epa.gov/airquality/urbanair/sipstatus/reports/map\\_i.html](https://www3.epa.gov/airquality/urbanair/sipstatus/reports/map_i.html). This website lists  
 for each state the individual SIP element that is required, the deadline for submission, the  
 latest action (either submittal/lack of submittal of the required element or EPA action on

any received submittals) and a link to the Federal Register in which any EPA action was published. It will be very straightforward to translate this up-to-date information from the publicly available website into an official finding by the agency.

- Preparing the Federal Register notice will also be greatly simplified in that the majority of the review requirements of more complicated rulemakings by the agency need not be addressed. In past EPA findings of a failure to submit a SIP, the agency has routinely determined that numerous statutory and regulatory requirements and Executive Orders do not apply to these straightforward findings of fact. Based on this precedent, **none** of the following will need to be applied for the findings:

- Executive Order 12866: Regulatory Planning and Review
- Paperwork Reduction Act
- Regulatory Flexibility Act
- Unfunded Mandates Reform Act
- Executive Order 13132: Federalism
- Executive Order 13175: Consultation and Coordination With Indian Tribal Governments
- Executive Order 13045: Protection of Children from Environmental Health Risks and Safety Risks
- Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use
- National Technology Transfer and Advancement Act
- Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations

In summary, in my opinion, for the above reasons and by assigning a high priority and commensurate resources to the effort, EPA should be able to prepare and sign a Federal Register notice making a finding that states have failed to submit parts of Good Neighbor provisions for Infrastructure SIPs for the 2012 PM<sub>2.5</sub> NAAQS within 30 days of a court ordering it to do so.

1 I declare, pursuant to 28 U.S.C. § 1746, under penalty of perjury that the foregoing is true and  
2 correct.

3  
4 Executed on May 29, 2017.

5  
6 /s/ David Howekamp

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8 DAVID P. HOWEKAMP

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# ATTACHMENT A



David P. Howekamp  
4191 Coralee Lane  
Lafayette, CA 94549  
925-284-8045  
email: howekamp@gmail.com

**ENVIRONMENTAL CONSULTANT**  
2000-present

Provide expert technical support to the Cy Pres Administrator for a \$20 million class action settlement funding a vehicle repair and scrappage program in California.

Provide expert witness analysis and testimony for an environmental organization regarding permitting requirements for a major deep water port LNG facility.

Provide expert witness analysis and testimony for an environmental organization regarding control technology permitting requirements for a major coal fired power plant.

Act as expert advisor to the Port Community Advisory Committee at the Port of Los Angeles providing advice and recommendations to the citizens regarding environmental studies and impacts and controls for port expansion projects.

As member of the Technical Working Group, participate in the development of the San Pedro Bay Clean Air Action Plan which describes the measures that the Ports of Los Angeles and Long Beach will jointly take toward reducing emissions related to port operations.

Participate on consultant team that analyzed the possibility of providing shore power for berthed ships at the Port of Long Beach.

Provide expert witness declarations for several environmental organizations regarding lawsuits against the Environmental Protection Agency.

Provide expert witness analysis of damage claims for a state attorney general in lawsuit regarding motor vehicle inspection program.

Provide expert witness analysis of Clean Air Act civil penalties for alleged violations by a major glass manufacturer and by a major wood products manufacturer.

Provide policy and regulatory advice to several electric utility clients and sugar refinery regarding air quality issues affecting their industry

Provide expert witness analysis of alleged Clean Air Act criminal violations for a major petroleum refinery and a gas/electric utility.

Prepare a voluntary Clean Air Plan for the cities of the Tri-Valley Area of Alameda County.

**ENVIRONMENTAL PROTECTION AGENCY  
REGION 9, SAN FRANCISCO, CA**

**DIRECTOR, AIR DIVISION  
1982-2000**

Primary responsibility to oversee implementation of the Clean Air Act and radiation programs in California, Arizona, Nevada and Hawaii. For seven years, also responsible for pesticides and toxic substances programs.

Principal advisor to the Regional Administrator on policy, political and technical issues involving air quality management and radiation. As member of the senior management team, provided advice on broader, cross-media issues involving water pollution, toxic chemicals and hazardous waste.

Facilitate or negotiate settlements between agencies, industries and public interest groups.

Interpret applicable state and local laws and regulations and integrate with Federal laws. Work closely with elected officials in state legislatures and on local air district boards to adopt needed laws, regulations and measures.

Manage a budget of over \$40 million and a staff of 120 scientists, engineers and planners to accomplish the following program activities:

- initiating Federal administrative or judicial enforcement against violating sources of air pollution
- reviewing project proposals and issuing Federal air quality permits to major industrial sources
- developing and approving State Air Quality Management Plans
- developing state motor vehicle emissions testing programs and other mobile source control programs
- providing program grants to state/local air management agencies
- delegation to, support and oversight of state/local air quality programs
- collection and quality assurance of ambient and source emission air quality data for planning or compliance
- implementation of public information and outreach programs
- developing emission limiting rules and regulations for source categories
- development of emissions trading and other economic incentive programs
- negotiation and implementation of international border agreements with the Government of Mexico

**ENVIRONMENTAL PROTECTION AGENCY  
REGION 9, SAN FRANCISCO, CA**

Prior to 1982, held progressively more responsible positions in the following areas:

- Managing development and approval of Air Quality Management Plans.
- Managing all permit programs in Region 9 including permits for air quality, wastewater discharge, dredge and fill, hazardous waste, PCB disposal and ocean dumping
- Developing emission inventories, ambient data and control strategies.
- Conducting mechanical engineering research and development of control technologies for emissions from stationary combustion sources.

**PACIFIC GAS AND ELECTRIC CO.  
SAN FRANCISCO, CA**

As staff engineer, measured meteorological phenomena to determine the diffusion patterns, possible temperature inversions, and other atmospheric characteristics of the future Diablo Canyon Power Plant.

**ORGANIZATIONS**

Air and Waste Management Association  
Lafayette-Moraga Youth Association Board

**AWARDS**

Presidential Rank Award of Meritorious Executive  
Awarded by the President of the United States  
Environmental Protection Agency Bronze, Silver and Gold Medals  
National Merit Scholar

**EDUCATION**

Master of Business Administration  
University of California, Berkeley

BS, Mechanical Engineering  
University of California, Berkeley